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Burying Lochner: Why Courts Should Reject Coming Attempts to Revive Economic Due Process

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NOTES

Burying *Lochner*: Why Courts Should Reject Coming Attempts to Revive Economic Due Process

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The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism [sic], that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.[2]

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[2] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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INTRODUCTION

Justice Oliver Wendell Holmes, Jr. wrote his canonical dissent in *Lochner v. New York*[3] eight years after penning that vivid analogy of dragons and history. Much had changed in Holmes's life and the landscape of American law during that time. He had been elevated from the Massachusetts judiciary to the Supreme Court of the United States in 1902,[4] where his brothers on the bench had recently crafted the "liberty of contract" doctrine that steered *Lochner*'s majority.[5] Holmes came upon a Court that embraced economic due process as a limit on state authority and legislative will—a doctrinal conclusion that the new Justice would not subscribe to.

If the Constitution is a great cave, then economic due process is one of its ancient caverns. It is walled off from the various other tunnels of the Fourteenth Amendment's chambers, tucked away and buried in history by the seismic forces of the New Deal. Behind that rubble lies many fearsome beasts of so-called judicial activism: *Adair*,[6] *Adkins*,[7] and *Coppage*,[8] among others. But as the legend goes, no monster was as feared as the *Lochner* dragon. It ruled a generation and defined an era.[9] In a fiery salvo, *Lochner* and its legion struck down any federal or state-passed economic regulation that encroached too far upon newly enshrined private contract rights.[10] Ostensibly, by protecting a worker's "right to purchase or to sell labor," the Court was preventing "unreasonable, unnecessary and arbitrary interference[s] with the right of the individual to his personal liberty[.]"[11] But what ensued was a dearth of regulatory (and judicial) safeguards at a time that the American worker was most

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[3] Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

[4] *Oliver Wendell Holmes, Jr.*, BIOGRAPHY, https://www.biography.com/people/oliver-wendell-holmes-jr-9342405 [https://perma.cc/44VD-AWDQ] (last updated Mar. 16, 2016).

[5] *See* Allgeyer v. Louisiana, 165 U.S. 578, 589–91 (1897) (holding that the Due Process Clause of the Fourteenth Amendment encompasses the right to contract); *see generally Lochner*, 198 U.S. 45.

[6] Adair v. United States, 208 U.S. 161, 179–80 (1908) (invalidating a federal attempt to prohibit contracts that barred workers from joining unions).

[7] Adkins v. Children's Hosp., 261 U.S. 525, 554–55, 559–60 (1923) (invalidating a federal minimum wage law for women).

[8] Coppage v. Kansas, 236 U.S. 1, 26 (1915) (invalidating a state attempt to prohibit the type of "yellow-dog contracts" at issue in *Adair*).

[9] *See* Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (Powell, J., plurality opinion) ("As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court."); *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 273–74 (2012) ("*Lochner* is . . . not just a case, but an era and an attitude."); David E. Bernstein, Lochner v. New York: *A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1520–21 (2005) (detailing the origins and spread of the phrase "*Lochner* era" in modern academia).

[10] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1391–96 (2001) (recounting the traditional interpretation of the *Lochner*-era Court).

[11] Lochner v. New York, 198 U.S. 45, 53, 56 (1905).

vulnerable to exploitation.[12] For forty years, the dragon roamed free in what William Howard Taft would proudly call "the most conservative country in the world."[13]

There are those who wish to sift through the rubble and excavate the ruins. A dedicated group of *Lochner* archaeologists have called into question the Court's repudiation of economic due process in favor of New Deal-era jurisprudence.[14] To this medley of advocates, judges, and scholars, *Lochner* is not a monster at all, but rather a watchful guardian against oppressive legislation.[15] Moreover, its supporters disagree that the doctrine has truly met its demise. At its core, the liberty of contract is no different from modern carve-outs in substantive due process: its viability requires a majority of Justices to regard its unenumerated protections as "life, liberty, or property" implicitly worth embracing.[16] While the Court has not preserved economic liberty as a fundamental right since at least 1937,[17] the Constitution itself does not prohibit Justices from re-introducing a doctrine into the Due Process canon. In this respect, the dragon is merely dormant—not dead.

At the outset of this Note, the author concedes to the revisionists this ancillary point.[18] *Ipso facto*, because unenumerated rights cannot disappear from an Article or Amendment, they are not vulnerable to endless interpretation like textual provisions. Just as the liberty of contract was "'interpreted' into being" and "interpreted into obscurity,"[19] the doctrine can be resuscitated through the Court's modern fundamental rights analysis.[20] But, the author contends that "low-grade" Lochnerism has already reemerged in federal courts,[21] and that the ensuing circuit split on this matter has forced liberal jurists into a difficult spot.[22] The author additionally argues that judges should resist calls for heightened scrutiny of economic legislation and

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[12] *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 377–406 (Harper Perennial Modern Classics 2015) (1980); Caleb Crain, *There Was Blood*, NEW YORKER, Jan. 19, 2009, https://www.newyorker.com/magazine/2009/01/19/there-was-blood [https://perma.cc/CF7P-XN5M] (revisiting the horrors of the "Ludlow Massacre" of striking miners in Colorado).

[13] ARTHUR M. SCHLESINGER, JR., THE CRISIS OF THE OLD ORDER: 1919–1933, THE AGE OF ROOSEVELT 60 (1957); *see infra* notes 56–94 and accompanying text.

[14] *See infra* Section II.A.

[15] *See infra* Section II.B.

[16] U.S. CONST. amend. XIV, § 1; *see also* Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (endorsing the protection of fundamental rights that are "implicit in the concept of ordered liberty" to the extent that "neither liberty nor justice would exist if they were sacrificed").

[17] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) (upholding a state minimum wage law for women and effectively overruling *Lochner*).

[18] As is the case *sui generis* to historical revisionism, this author does not use the term "revisionists" here pejoratively. *See generally* James McPherson, *Revisionist Historians*, AM. HIST. ASS'N: PERSPECTIVES ON HISTORY, Sept. 2003, https://www.historians.org/publications-and-directories/perspectives-on-history/september-2003/revisionist-historians [https://perma.cc/5LX5-NQUT]. Moreover, *Lochner* revisionists generally embrace this label. *See* Bernstein, *supra* note 9, at 1473 ("Revisionists have successfully challenged conventional wisdom . . . .").

[19] G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 40 (1978).

[20] *See generally* PAUL KENS, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL 187 (1998) (declaring that, given more recent displays of judicial activism from the Court, "*Lochner* is not dead").

[21] *See infra* notes 221–225 and accompanying text; *infra* Section III.A.

[22] *See infra* Section IV.C.

that further attempts to awaken the *Lochner* dragon risk repeating the errors of a rightfully discredited period in constitutional law and economic thought. While Justice Holmes may have embellished the *Lochner* majority's intentions in his dissent,[23] and though liberal jurists have long abandoned his prohibitive stance on *all* forms of substantive due process,[24] Holmes was ultimately correct to deny economic liberty its status as a "useful animal."[25]

Part I of this Note recapitulates the history of the liberty of contract at the Supreme Court: its origins and ascension as a constitutional protection, and economic due process's eventual demise at the hands of the New Deal. Part II reviews the doctrine's resurgence among libertarian jurists, as well as the possible impact of their advocacy upon mainstream adherents of originalism. Part III examines a line of cases where courts have already taken on a more activist role regarding economic legislation, which offer fertile ground for more expansive excavation. Part IV challenges the overarching revisionist goal of unleashing *Lochner* from its confines, and it offers a concession to libertarians that preserves the constitutionality of redistributive legislation. Finally, Part V concludes the Note by evaluating Holmes's grand metaphor in the context of this century-old battle.

I. FORGED IN FIRE, FELLED BY MAIDS: THE RISE AND DEMISE OF ECONOMIC LIBERTY AT THE SUPREME COURT

To be sure, this Note is not another case of "crying wolf" about *Lochner*, though it is true that the "*Lochner* bogeyman" is a common trope in substantive due process scholarship.[26] As John Hart Ely famously described the post-*Lochner*, pre-*Roe v. Wade*[27] span of constitutional law, those critical of the Warren Court's expansion of unenumerated rights would often "cry[] *Lochner*" on occasions where its liberal Justices were perceived to have enforced their personal ideals of liberty and equality

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[23] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 418–19 (2011) (responding to the argument that the *Lochner* court invented the right to contract by observing that "[t]he right had been recognized in prior cases, including unanimously in *Allgeyer v. Louisiana*").

[24] Randy E. Barnett, Foreword, *What's So Wicked About* Lochner?, 1 N.Y.U. J.L. & LIBERTY 325, 325–29 (2005) (illustrating the eventual embrace of Lochnerian ideals by liberals in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113 (1973)).

[25] The author utilizes the phrase "economic liberty" throughout this Note strictly to engage its proponents on their own terms. But, in the greater arena of constitutional discourse, this author is loath to characterize the Fourteenth Amendment's conception of liberty as an inherently anti-government initiative. While libertarians decry legislation that produces excessive barriers to entry in certain occupational markets, see *infra* Section III.B, one could argue that our most economically disadvantaged citizens benefit more from federal guarantees of baseline wages, rights to unionize and collectively bargain, safety in the workplace, and access to affordable healthcare than from passive, non-interventionist governments.

[26] Patel v. Texas Dep't of Licensing, 469 S.W.3d 69, 94 n.11 (Tex. 2015).

[27] 410 U.S. 113 (1973).

in lieu of textual fidelity.[28] Thus, when a true case of "Lochnering" came down from the Supreme Court in the form of *Roe*'s privacy protections and trimester framework, the calls for alarm mostly fell on deaf ears.[29]

But this is no false harbinger. In a comprehensive analysis of modern *Lochner* revisionism, Thomas B. Colby and Peter J. Smith argue that new-school trends in conservative jurisprudence have not only laid the groundwork for a resurgence of economic liberty, but perhaps started constructing its foundation.[30] Whereas the judiciary spurred the brunt of liberal legal theory in the latter twentieth century, forcing liberal academics to react to the courts' rapid expansion of substantive due process,[31] libertarian scholars have done most of the movement's heavy lifting. This assortment of advocates, politicians, and professors have drawn the blueprints and plotted the land, Colby and Smith observe, and "it will not be long before the bulldozers break ground."[32]

But, before examining the methods by which the revisionists have turned the tide, it is important to understand what about the *Lochner* dragon excites its admirers and terrifies its detractors. For that, we must peer back into the nineteenth century and trace the origins of economic due process through its adoption by a majority of the Court. This story begins not with an epic clash of industrial capital and organized labor, as this era is often thematically framed,[33] but with the rise of the temperance movement in the Great Plains.

A. Origins (1887–1897)

One of the first articulations of *Lochner*-era jurisprudence appears in *Mugler v. Kansas*.[34] In 1880, the Kansas state legislature amended its constitution to prohibit the "manufacture and sale of intoxicating liquors" except for licensed medical or scientific purposes, and it passed an act to carry the law into effect.[35] Pete Mugler was subsequently indicted under the act for the unlicensed commercial use of his

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[28] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943–44 (1973).

[29] *Id.* at 944.

[30] Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 532 (2015).

[31] *Id.*

[32] *Id.* As one professor adroitly summarizes, "Court-watchers across the political spectrum have cried wolf before; but this time the paw prints are very large indeed." Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY (Winter 2012), https://democracyjournal.org/magazine/23/the-roberts-court-v-america/ [https://perma.cc/ZAM4-ELXD].

[33] *See, e.g.*, Rob Hunter, *Waiting for SCOTUS*, JACOBIN, Spring 2014, at 35, 37 ("The [*Lochner*-era] Court became an important conservative veto point during the showdowns between labor and capital prior to the New Deal."); *see also* Karl Kautsky, *Socialist Agitation Among Farmers in America*, 3 INT'L SOCIALIST REV. 148, 148 (1902) ("Capitalism makes its greatest progress in America. There it reigns with the most unlimited brutality and carries the class antagonisms to a climax.").

[34] 123 U.S. 623 (1887).

[35] *Id.* at 655.

brewery based in Saline County, Kansas.[36] Mugler argued that the uncompensated devaluation of his brewery amounted to a taking and was constitutionally barred by the Fourteenth Amendment's protection of "life, liberty, or property, without due process of law."[37]

The salient issue in *Mugler* appears to be a regulatory taking matter, which is the focus of most of the contemporary analysis of the case.[38] But more immediately important were the nascent guidelines it fomented for future Progressive-era legislation. In his opinion for an eight-member majority, Justice John Marshall Harlan installed a sort of proto-rational basis test in holding against Mugler, stating that it was the legislative branch's role "to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."[39] But, Justice Harlan continued, "It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State."[40] Although "every possible presumption [of validity] is to be indulged in favor of the validity of a statute," that presumption was rebuttable "[i]f . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law*[.]"[41] In determining whether the state's good intentions justified the regulation of the manufacture and sale of alcohol,[42] *Mugler* represented the Court's first in-depth examination of the relationship between the states' police power and a substantive element of the Fourteenth Amendment's Due Process Clause.[43]

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[36] *Id.* at 653.

[37] *Id.* at 657. The devaluation, Mugler argued, was evident in the fact that the building's machinery was "of little value if not used for the purpose of manufacturing beer." *Id.*

[38] *See, e.g.*, Elizabeth L. Cate, *Back to Basics: The South Carolina Supreme Court Returns to the* Mugler v. Kansas *Era of Regulatory Takings Doctrine*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 237, 239 (1992); Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from* Mugler *to* Keystone Bituminous Coal, 14 B. C. ENVTL. AFF. L. REV. 653, 660 (1987).

[39] *Mugler*, 123 U.S. at 661; *see also* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J. L. & LIBERTY, 1055, 1061–66 (2014) (paralleling Justice Harlan's reasoning in *Mugler* to later developments in rational basis jurisprudence).

[40] *Mugler*, 123 U.S. at 661.

[41] *Id.* (emphasis added).

[42] Harlan did not mince his words regarding alcohol's effect on the populace, stating that "it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits." *Id.* at 661–62.

[43] Hippler, *supra* note 38, at 659–60.

Dissenting in solo was Justice Stephen Field, the Court's resident arch conservative[44] and its most strident defender of laissez-faire principles.[45] While Justice Harlan installed a framework through which state legislation could be thwarted by substantive claims of due process (but declined to afford commercial brewing such protection),[46] Justice Field painted with a broader brush. Echoing his fiery dissents in the *Slaughter-House Cases*[47] and *Munn v. Illinois*,[48] in which he vocalized his career-defining belief that the Fourteenth Amendment offered substantive protections as well as procedural ones,[49] Justice Field declared that a "great wrong" had been visited upon the "manufacturers of liquors."[50]

The majority believed they had "gone to the utmost verge of constitutional authority[]" in upholding the state's regulation, but, in reality, "it ha[d] passed beyond that verge, and crossed the line which separates regulation from confiscation."[51] To Justice Field, Kansas's law was another unjustifiable encroachment upon the natural rights of citizens—here, the ability to pursue a common calling free of state interference.[52]

In *Mugler*, Justice Harlan's opinion provided the mechanics for economic due process; Justice Field's dissent provided its rhetoric. Only one Justice in 1887 was willing to identify economic liberty as inherent in the Fourteenth Amendment, but that would change over the next decade as the Court underwent a period of rapid turnover in personnel.[53] Crucially, two appointments went to Justices David J.

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[44] *See* IAN MILLHISER, INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED 7–11 (2015) (discussing Field's extremist views); Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 LAW & HIST. REV. 541, 564–76 (2002) (critically analyzing Field's jurisprudence in light of favorable revisionist scholarship).

[45] *See* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900, at 153 (2007) (christening Field as "[t]he father of 'laissez-faire constitutionalism'").

[46] *Mugler*, 123 U.S. at 662 ("[T]he entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship.").

[47] 83 U.S. (16 Wall) 36, 83 (1872) (Field, J., dissenting).

[48] 94 U.S. 113, 136 (1876) (Field, J., dissenting).

[49] *See* BRIAN DOHERTY, RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT 28 (2007) ("Field was one of the pioneers of the concept (beloved by many libertarian legal thinkers) of substantive due process—the notion that the due process protected by the Fourteenth Amendment applied not merely to procedures but to the substance of laws as well.").

[50] *Mugler*, 123 U.S. at 678 (Field, J., dissenting).

[51] *Id.*

[52] *See* John C. Eastman & Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier*, 6 NEXUS 121, 123 (2001) (detailing Field's commitment to natural law philosophy); BEATTY, *supra* note 45, at 149 ("Natural law furnished a lever to upend laws enacting the fallible will of the people . . . Field's opinions descend from 'right,' 'principles of morality,' and 'eternal verity.'"). For an explicit example of Field's natural rights-based jurisprudence, see *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96–97 (Field, J., dissenting) (explaining that the [Fourteenth] Amendment "refers to the natural and inalienable rights which belong to all citizens").

[53] Between 1888 and 1895, Grover Cleveland and Benjamin Harrison made eight total appointments to six different seats. *See* Owen M. Fiss, *Fuller Court (1888–1910), in* ENCYCLOPEDIA OF THE

Brewer and Rufus W. Peckham—the "intellectual leaders" of the Fuller Court's conservative hegemony[54] and willing inheritors of Justice Field's unfinished work.[55] Barely a year after Justice Peckham's nomination to the Court, and in the final term of Justice Field's career, an opportunity arose to finish the job.

On its face, *Allgeyer v. Louisiana*[56] appeared to be a simple case—one with little chance of altering the constitutional landscape. Louisiana's legislature passed a statute in 1894 that required marine insurance agencies not licensed in the state to station an agent within Louisiana's borders if they wanted to contract with the state's citizens.[57] In practice, this placed a burden on Louisianans' abilities to contract with most out-of-state agencies.[58] Applying *Mugler*, the Court could have simply struck down the statute and called it a day; economic protectionism alone would not have satisfied Justice Harlan's requirement that a law protect the public's health, morals, or safety. But Justice Peckham, writing for a unanimous Court, broadly read the scope of "liberty" in the Due Process Clause to encompass a substantive, economic element:

> The liberty mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties[;] to be free to use them in all lawful ways[;] to live and work where he will[;] to earn his livelihood by any lawful calling[;] to pursue any livelihood or avocation[;] and for that purpose to enter into all contracts which may be proper, necessary[,] and essential to his carrying out to a successful conclusion the purposes above mentioned.[59]

He proceeded to link this newfound liberty to "the privilege of pursuing an ordinary calling or trade and of acquiring, holding[,] and selling property"[60] and then

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AMERICAN CONSTITUTION 1164 (Leonard W. Levy & Kenneth L. Karst eds., Macmillan Reference USA 2d ed. 2000) (1986).

[54] *Id.* at 1164–65.

[55] *See* CHARLES FAIRMAN, AMERICAN CONSTITUTIONAL DECISIONS 324 (Henry Holt & Co. rev. ed. 1950) (1948) ("Peckham . . . in upholding the new 'liberty of contract,' carried on where [Justice Field] once led[.]"); MILLHISER, *supra* note 44, at 96 ("Peckham was the perfect justice to . . . write Justice Field's conservative vision into the Constitution."). Brewer, it should be mentioned, was Field's nephew. *See* BEATTY, *supra* note 45, at 157–58 ("The *Slaughter-House* dissent staked out the ground [Field] fought on for the rest of his twenty-three years on the Court, that his nephew, Justice David Brewer, fought on, that a Fieldian Court fought on from the mid-1890s until the New Deal, and that a new conservative Court may fight on into the twenty-first century: property over community.").

[56] 165 U.S. 578 (1897).

[57] *Id.* at 583.

[58] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 178 (1991) ("The legislature probably enacted the statute in *Allgeyer* to protect in-state insurance companies from out-of-state competitors.").

[59] *Allgeyer*, 165 U.S. at 589.

[60] *Id.* at 591.

invalidated the Louisiana statute for interfering with an individual's right to contract "outside the state."[61]

If it feels like that profound declaration came out of nowhere, that is because it mostly *did* come out of nowhere. In barely four pages of writing, and relying on just two holdings as precedent,[62] Justice Peckham appeared to fundamentally modify the intertwined futures of due process jurisprudence and economic-based legislation. *Lochner*'s cave was now open to the masses.

B. Reign (1897–1934)

The Justices, however, had not scrapped *Mugler*'s framework altogether. Just one year after *Allgeyer* was decided, the Supreme Court upheld a Utah law limiting the number of working hours for miners in the case of *Holden v. Hardy*.[63] While "the police power cannot be put forward as an excuse for oppressive and unjust legislation," the Court assured that it could limit economic due process when "preserving the public health, safety, or morals[.]"[64] Moreover, state legislatures still possessed broad discretion in determining "not only what the interests of the public require[d], but what measures [were] necessary for the protection of such interests."[65]

So, what did *Allgeyer* really change? The Court made passing references to this theory of "liberty of contract" in the years immediately following its inception,[66] but what did it entail? To what extent did it reach? Few would disagree that a state had a strong interest in maintaining the health and safety of its miners.[67] What would the Justices do with an issue that was not black and white?

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[61] *Id.* at 592–93.

[62] *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 44–45 (2003). Bernstein observes that Peckham's holding in *Allgeyer* is cobbled together exclusively from Harlan's dicta in Powell v. Pennsylvania, 127 U.S. 678, 684 (1888), and a concurring opinion in Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughterhouse Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring). *Id.* at 44. But, Harlan actually upheld state restrictions on the sale of margarine in *Powell*, and the *Butchers' Union* concurrence generally denounced government-sponsored monopolies. *Id.* Even combined, these opinions were "dubious authority for a broad right to liberty of contract." *Id.*

[63] 169 U.S. 366, 397 (1898).

[64] *Id.* at 392.

[65] *Id.* (quoting Lawton v. Steele, 152 U.S. 133, 136 (1894)).

[66] *See* N. Sec. Co. v. United States, 193 U.S. 197, 351 (1904); Patterson v. Bark Eudora, 190 U.S. 169, 173–74 (1903); Hopkins v. United States, 171 U.S. 578, 603 (1898); United States v. Joint Traffic Ass'n, 171 U.S. 505, 572–73 (1898).

[67] Note, however, that *Holden* was a 7–2 decision; Brewer and Peckham dissented without filing opinions. *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 21 (2011) (observing the duos' tendency to silently dissent in cases concerning state police power); MILLHISER, *supra* note 44, at 96. It is unclear if these Justices believed that the employers' and employees' due process rights outweighed the legitimate safety concerns of the state or that the concerns themselves were not legitimate. A more likely explanation is that they perceived Utah's statute as a form of special-interest "class legislation." *See generally* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 330 (1985) (concluding that the "heart" of laissez-faire constitutionalism "was opposition to class and special legislation").

The Lochner dragon arrived at the Court's footsteps in 1905. New York had passed a law eight years prior that prohibited bakery employees from working more than ten hours per day or sixty hours per week, which Joseph Lochner—a Utica-based bakery owner—challenged as an unconstitutional deprivation of his liberty to contract with his workers.[68] The Court, which had welcomed three new arrivals on the bench since *Allgeyer* (among them Justice Holmes),[69] was tasked with deciding whether the New York statute was a reasonable exercise of its police power in the mold of *Holden*,[70] or an excessive infringement of its citizens' freedom to "enter into all contracts which may be proper, necessary[,] and essential."[71]

In a 5–4 decision, the late Justice Field was finally vindicated.[72] Justice Peckham, writing again for the Court, invalidated the statute as an "unreasonable, unnecessary[,] and arbitrary interference with the right of the individual to his personal liberty."[73] Specifically, he determined that New York's law was unnecessary to protect the public health,[74] the bakers' health,[75] or the imbalance in bargaining power between bakery employers and employees.[76] These assertions, of course, become tenuous at best upon the slightest review of contemporaneous industry standards.[77] Regardless, Justice Peckham made a clear distinction between the bakers' plight and the facts present in *Holden*: "[T]he trade of a baker . . . is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual[.]"[78]

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[68] Lochner v. New York, 198 U.S. 45, 46, 52 (1905).

[69] *See* Fiss, *supra* note 53, at 1164.

[70] *See supra* notes 63–65 and accompanying text.

[71] *See supra* text accompanying note 59.

[72] *See* MILLHISER, *supra* note 44, at 96 ("Six years after Field's death and just eight years after his retirement from the bench, *Lochner v. New York* would be more than just a victory for Joseph Lochner, it would be the culmination of Field's life's work.").

[73] *Lochner*, 198 U.S. at 56.

[74] *Id.* at 57.

[75] *Id.* at 59.

[76] *Id.* at 57 ("There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.").

[77] Colby and Smith provide a summary of Progressives' many problems with Peckham's arguments. Colby & Smith, *supra* note 30, at 537–38. Indeed, many critics aver that the majority was "either unconsciously oblivious or viciously hostile to the realities of the sweatshop-era workplace[.]" *Id.* at 537. New York's bakers at the time often toiled in squalid working conditions, akin to "hot dungeons" lacking proper ventilation, *see* MILLHISER, *supra* note 44, at 91–94, and the state legislature was well aware of the potential health risks this posed to consumers. *See* Matthew S.R. Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the* Lochner *Court*, 1 N.Y.U. J.L. & LIBERTY 476, 482 (2005). Additionally, the number of hours worked was almost certainly a legitimate concern, as bakers in the industrial era often worked in excess of one-hundred hours per week. Paul Kens, Lochner v. New York: *Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 407 (2005).

[78] *Lochner*, 198 U.S. at 59.

A pair of dissents came from the Court's most famous figures. Justice Harlan was inclined to uphold the statute under the rational-basis framework he set forth in *Mugler*.[79] In his view, because the "liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society," pro-active legislation should not "be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[80] In that spirit, New York's law was clearly within the acceptable threshold, as "labor in excess of sixty hours during a week in such establishments may endanger the health" of bakery employees.[81]

Because Justice Harlan conceded that the Due Process Clause protected the liberty of contract to some extent, Justice Holmes stood alone in insisting that the clause contained no such economic component.[82] His most famous remark in the 617-word dissent—"[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics"—is unmistakable in its message: that Justice Peckham and his corroborators were impermissibly reading their anti-regulatory, "survival of the fittest" economic views into the provisional text.[83] Hence, "a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*."[84] To Justice Holmes, the word "liberty" becomes

> perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that[] a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law[.][85]

Liberty of contract did not qualify as a fundamental right because economies had been regulated and professions had been licensed since the beginning of time. As Justice Holmes observed, the majority's notion of economic free will was controverted by "ancient examples" of regulations like "[s]unday laws and usury laws," and more contemporary examples like anti-lottery laws.[86]

If Harlan wished to shackle the dragon, Holmes intended to slay it. But Justice Peckham's opinion carried the day, and it transcended the next three decades of constitutional law as the Court ossified as a "conservative bulwark against attempts to expand the reach and authority of public institutions."[87] Under the liberty of contract theory, the Justices struck down a litany of regulations that are now

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[79] *See id.* at 65–68 (Harlan, J., dissenting).

[80] *Id.* at 68.

[81] *Id.* at 69.

[82] *Id.* at 74–76 (Holmes, J., dissenting).

[83] *Id.*; *see also* MILLHISER, *supra* note 44, at 90–91, 111–12 (detailing Spencer Herbert's influence on American intellectuals as well as a Wisconsin Supreme Court case invoking the liberty of contract).

[84] *Lochner*, 198 U.S. at 75 (alteration in original).

[85] *Id.* at 76.

[86] *Id.* at 75.

[87] Hunter, *supra* note 33, at 37.

commonplace today, doing so on the basis that they interfered with principles of employee-employer negotiations, regardless of whatever balance in bargaining power actually existed in the industry.[88] Minimum wage laws were routinely scorched by *Lochner*'s inferno.[89] Laws forbidding "yellow-dog" contracts—where a worker agreed, as a condition of employment, to not be a member of a labor union—met a similar fate.[90] The Court upheld a limit on working hours for women, but it did so under sexist logic, emphasizing the importance of child-rearing and the perils of female physical inferiority in the workplace[91] (wage floors for women, of course, were roundly denied). It is of little coincidence that a majority of Justices at this time were interpreting the Commerce Clause on extremely narrow grounds, invalidating Congress's attempts to regulate child labor practices[92] and working conditions for coal miners.[93] The areas of law were doctrinally distinct, but the logic that steered their conclusions was all too similar.[94]

C. Downfall and Defeat (1934–1955)

We know this period was not the permanent state of things. We know the dragon was eventually confined. But when did it happen? How was it done? Contrary to the conventional telling of events, which proffer that economic due process met an immediate and unexpected death in the case of *West Coast Hotel Co. v. Parrish*,[95] the Supreme Court signaled its end three years earlier in *Nebbia v. New York*[96]—but did not seal the cave until the 1950s.

In *Nebbia*, New York's legislature established a board that enacted maximum and minimum prices for milk as a means of aiding destitute dairy farmers amidst the nadir of the Great Depression.[97] A grocer challenged the board's milk-pricing

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[88] *See infra* notes 322–325 and accompanying text.

[89] *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[90] *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

[91] Muller v. Oregon, 208 U.S. 412, 421–23 (1908).

[92] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

[93] *See, e.g.* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[94] *See* Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism*, 1900–1937, 35 AM. J. LEGAL HIST. 70, 97–98 (1991) (arguing that, in spite of revisionist efforts, laissez-faire jurisprudence still explains much of the "seemingly disparate decisions" of the early twentieth century); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 203 (2014) (discussing the relationship between Lochner-era laissez-faire jurisprudence and a commitment to a federalist constitutional structure). Incredibly, conservative judges were simultaneously reading the Sherman Antitrust Act so expansively as to apply it to striking labor unions. *See, e.g.* Loewe v. Lawlor, 208 U.S. 274 (1908); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1158–60, 1175–76, 1221–22 (1989).

[95] 300 U.S. 379 (1937).

[96] 291 U.S. 502 (1934).

[97] *Nebbia*, 291 U.S. at 515–18.

regulations as a violation of his due process under the liberty of contract to determine his own prices.[98] Justice Owen Roberts, the quintessential swing vote of his era,[99] unexpectedly sided with the Court's liberal wing in upholding the regulations,[100] handing Progressives a rare win during President Franklin D. Roosevelt's first term in office. Justice Roberts wrote in language more familiar to the pre-*Allgeyer* Court, granting great deference to states "to adopt whatever economic policy may reasonably be deemed to promote public welfare."[101] And with regard to the liberty of contract, "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied[.]"[102]

Today, we recognize this doctrine as the rational basis test: the final distillation of Justice Harlan's concoction in *Mugler*. The Court, perhaps realizing it had prematurely de-fanged the dragon in *Nebbia*, continued this reversal in *West Coast Hotel* by explicitly rejecting Justices Field's and Peckham's shared vision of the Constitution.[103] In *West Coast Hotel*, a chambermaid sued her employer for not complying with Washington State's minimum wage law, placing *Adkins v. Children's Hospital* up for review.[104] The same five Justices that upheld the regulations at issue in *Nebbia* and *West Coast Hotel* vindicated the maid's claim, holding that "the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed."[105]

The past era was called into question and summarily denounced: "This power . . . to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable."[106] Moreover, "the legislature is entitled to its judgment" even if "the wisdom of the policy be regarded as debatable and its effects uncertain."[107]

With the presumption of validity now safely returned to the states' corner, *Adkins* was explicitly overruled. *Lochner*, which the *Adkins* majority had relied upon in striking down wage floors,[108] was overruled *sub silentio*.[109] The Court, now singing the New Deal's tune with full-throated approval, would codify the rational basis test for economic legislation in the body of *United States v. Carolene Products Co.*, while forecasting liberal protections for substantive noneconomic rights in the opinion's

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[98] *Id.* at 531.

[99] *See* MILLHISER, *supra* note 44, at 152–57 (illustrating the impact of Roberts's role as the swing vote and his reversal on various economic regulations in 1937).

[100] *See Nebbia*, 291 U.S. at 537–39.

[101] *Id.* at 537.

[102] *Id.*

[103] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 395–400 (1937).

[104] *W. Coast Hotel*, 300 U.S. at 386–90.

[105] *Id.* at 397.

[106] *Id.* at 392–93.

[107] *Id.* at 399.

[108] *Adkins*, 261 U.S. at 545, 548–50.

[109] *See W. Coast Hotel*, 300 U.S. at 397–400.

infamous fourth footnote.[110] Justice Hugo Black, looking back at the wreckage, calcified his generation's distaste for the *Lochner* era in 1949 by referring to the liberty of contract as a "due process philosophy that has been deliberately discarded."[111] But the final blow to the dragon's dominion—the metaphorical dancing on *Lochner*'s grave, so to speak—came in 1955. In *Williamson v. Lee Optical*, the Court stretched rational basis to its theoretical limit by upholding an Oklahoma statute that permitted only licensed optometrists to fit lenses to faces or replace the frames of glasses, despite the relative simplicity of the process:

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.[112]

Even though the statute "may exact a needless, wasteful requirement in many cases[,] . . . it [was] for the legislature[s], not the courts, to balance the advantages and disadvantages of the new requirement."[113]

By shelving the liberty of contract for generations to come, Progressives won the battle of the twentieth century. But recent developments in conservative jurisprudence signal that the war over economic due process will be rekindled in the new millennium.

II. RESURGENCE IN THE RANKS: THE DOCTRINE FINDS NEW DISCIPLES

The mainstream treatment of *Lochner* today is almost uniformly hostile, but it differs sharply along ideological lines: conservatives decry the case for protecting unenumerated rights, while liberals shun it for protecting the *wrong* unenumerated rights. This shared hostility has ceded ground to libertarian intellectuals to re-shape the narrative of *Lochner* and cultivate a new generation of advocates.

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[110] United States v. Carolene Products, Co., 304 U.S. 144, 152 & n.4. (1938).

[111] Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 535–37 (1949). This began the process of a "Carthaginian [P]eace," by which Justices such as Black "ploughed salt into the fields of *Lochner* and made its name anathema for decades." Purdy, *supra* note 94, at 209.

[112] Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955).

[113] *Id.* at 487. The Court offered several explanations as to why the state may have found the law necessary, including the frequency with which lens-fitting appointments also necessitated optometrist expertise in other eye-related issues. *Id.* While the statute did not require that a patient receive an eye examination for each change or duplication of lenses, the potential "for detection of latent ailments or diseases" during such appointments represented the "evil at hand for correction" that satisfied rational basis review. *Id.* at 487–88.

Colby and Smith have documented the evolution of *Lochner* as a staple in our constitutional anti-canon.[114] While Progressives generally practiced what they preached upon gaining control of the Supreme Court in the Roosevelt and Truman administrations, exercising the type of judicial deference to legislatures that figures like Felix Frankfurter sermonized for decades,[115] a new generation of liberal appointees assumed a more activist posture in enforcing their own ideals of justice.[116] The liberals of the Warren and Burger Courts embraced unenumerated rights in *Griswold v. Connecticut*[117] and *Roe v. Wade*,[118] the latter of which brought substantive due process back to the bench in full swing.[119] Contemporary theorists criticized this development as a Lochnerian twist of hypocrisy,[120] even levying that "*Lochner* and *Roe* are twins," birthed from the same unholy marriage of judicial activism and personal preferences.[121] Modern liberals typically justify this expansion in terms of the "living Constitution," which adapts to the evolving societal values of the day,[122] but a form of cognitive dissonance has existed within liberal legal theory ever since.[123]

Meanwhile, modern conservative jurisprudence—essentially lost in the wilderness for decades post-*West Coast Hotel*—emerged mostly as a reaction to the Warren Court's activism.[124] Under the massively influential theory of originalism spearheaded by Robert Bork and Antonin Scalia, the recognition of unenumerated rights was seen as an unjustifiable deviation from the "original intent" of the Constitution's Framers.[125] As such, the type of judicial activism that generates substantive due process is *per se* unconstitutional.[126] While *Roe* and its "right of privacy" were the *bête noire* of originalist converts, this generation of conservatives was happy to denounce the *Lochner* era as the earliest example of activist heresy.[127]

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[114] Colby & Smith, *supra* note 30, at 541–79.

[115] *Id.* at 543–44.

[116] *Id.* at 549–50.

[117] *See generally* 381 U.S. 479 (1965).

[118] *See generally* 410 U.S. 113 (1973).

[119] *See id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[120] *See* Colby & Smith, *supra* note 30, at 555.

[121] Ely, *supra* note 28, at 940.

[122] Colby & Smith, *supra* note 30, at 556–57.

[123] *See* MILLHISER, *supra* note 44, at 208 ("*Roe* . . . placed liberals in the awkward position of defending the very same unchecked approach to judging that left millions of workers virtually powerless against exploitation by their employers[.]"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 778 (2d ed. 1988) (1978) (conceding that "[n]one of the theories offered to date is [sic] wholly satisfying" regarding liberal defenses of unenumerated rights).

[124] Colby & Smith, *supra* note 30, at 558–60; *see also* MILLHISER, *supra* note 44, at 199–204 (chronicling the arc of Nixon's campaign against the Warren Court in calling for judicial restraint).

[125] Colby & Smith, *supra* note 30, at 565–67.

[126] *Id.* at 560–61.

[127] *Id.* at 560–63; *see also* MILLHISER, *supra* note 44, at 209–11 (discussing the Reagan administration's hostility toward the concept of unenumerated rights).

But a libertarian strand of conservatism had detached itself from the mainstream's total rejection of substantive due process, even during the Reagan administration where Bork and Scalia's views were ascendant.[128] This undercurrent, first churned by Richard Epstein[129] and Bernard Siegan,[130] has swelled into a river of scholarship in recent years, channeling libertarian protections of property rights and free-market interests into an activist blend of originalism. Through these efforts, there is hope within the movement that the dragon will return to the world once more.

A. The Rehabilitationists

In the context of today's political environment, it is little wonder why the liberty of contract remains attractive to twenty-first century libertarians: its anti-collectivist,[131] anti-redistributive,[132] and anti-regulatory[133] credentials make it a

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[128] *See* Colby & Smith, *supra* note 30, at 564–65.

[129] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112 (1985) ("The sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud."); *see also* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 734 (1984) ("*Lochner* may well have given *too much* scope to the police power, for it can be argued that there is no reason to interfere with freedom of contract, even for reasons of health, where no third-party interests are at stake.").

[130] *See generally* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (Transaction Publishers ed.-2006) (1980); Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453, 496–97 (1985); *See generally* Moreover, Siegan's nomination to the Ninth Circuit Court of Appeals in 1987 failed in part due to his "ardent libertarian views on economic matters," buttressed by his belief "that the Constitution protected what he called the 'economic liberties' of individuals." Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. TIMES (Apr. 1, 2006), http://www.nytimes.com/2006/04/01/us/01siegan.html [https://perma.cc/F7ZN-NVCJ].

[131] *See* Janice Rogers Brown, Assoc. Justice, Cal. Supreme Court, Address to the Federalist Society at the University of Chicago School of Law, "A Whiter Shade of Pale": Sense and Nonsense—The Pursuit of Perfection in Law and Politics (Apr. 20, 2000) (transcript available at http://communityrights.org/PDFs/4-20-00FedSoc.pdf [https://perma.cc/SY45-WTCW]) (asserting that the New Deal "inoculated the federal Constitution with a kind of underground collectivist mentality").

[132] *See* AMAR, *supra* note 9, at 274, 561 n.26 (arguing that, in spite of revisionist reasoning to the contrary, the *Lochner* Court's "root objection" to Progressive laws was "that they were designed to redistribute wealth from employers to laborers"); *see also* James W. Ely, Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 635 (2009) ("Peckham was hostile to what he perceived as class legislation and schemes to redistribute wealth."); Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2392 (2003) ("The [*Lochner*] Court was . . . both viewing the statute as a wealth transfer and concluding that a statute that produced a wealth transfer, without benefitting society as a whole, was unconstitutional, even if the legislature decided that legitimate reasons existed for aiding a particular group."). These observations generally pull from the text of the opinion itself, where Peckham castigated New York's statute as "a labor law, pure and simple." Lochner v. New York, 198 U.S. 45, 57 (1905).

[133] *See* Colby & Smith, *supra* note 30, at 568 ("[I]t is not surprising to find that many central figures in the conservative legal movement went to great lengths to stress that their opposition to *Lochner* was a matter of legal principle, as evidenced by the fact that they agreed in large part, as a matter of policy, with

strong candidate to roll back the New Deal's excesses. Furthermore, the doctrine's origins in natural rights philosophy allow it to seamlessly integrate with traditional libertarian pedagogy.

To this point, the author has broadly referred to libertarian academics and scholars bent on re-introducing economic due process to the country as *Lochner* revisionists. But, a more apt label for this group would be "Rehabilitationists."[134] A revisionist wishes to correct the record, but a Rehabilitationist has an agenda. And these scholars are not merely attempting to flip the script of a long-dead case as a matter of exacting historical accuracy; the Rehabilitationists want to make *Lochner* more attractive for future use.

One such Rehabilitationist is David Bernstein, the leading authority on the *Lochner* case among this "new wave of libertarian scholars."[135] Bernstein's 2011 book, *Rehabilitating Lochner*,[136] is the culmination of a career's worth of scholarship relating to the liberty of contract doctrine.[137]

Specifically, in building upon previous revisionist efforts and adding to the record, Bernstein sought to offer a modernized account of the *Lochner* case and the era of economic liberty more generally as an effort to correct the various myths that have "unfairly maligned" economic due process jurisprudence.[138] And on the simple matter of fact-checking, Bernstein is roundly successful.

First, some evidence exists to question the New York legislature's motives in passing the bakery law at issue in *Lochner*. While the traditional account of the case positions the state as a benevolent entity acting on behalf of the health and safety of vulnerable employees,[139] and thus surpassing the hurdles on economic liberty set in *Holden*,[140] Bernstein frames the statute as a rent-seeking sham, surreptitiously enacted on behalf of large-scale bakeries and New York's xenophobic bakers' union that supported the legislation to curb competition from immigrant-run shops.[141]

Lochner's antiregulatory impulse."); *see also* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG. (Apr. 17, 2005), http://www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html [https://perma.cc/YZG7-33FJ]

(articulating the present day evolution of the Constitution in Exile movement).

[134] Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal [https://perma.cc/RBL2-4FJ6].

[135] Colby & Smith, *supra* note 30, at 569–70.

[136] *See* BERNSTEIN, *supra* note 67.

[137] Most of Bernstein's scholarship either eponymously invokes *Lochner* or at least implicates economic liberty. *See* David E. Bernstein, *Curriculum Vitae*, https://www.law.gmu.edu/assets/files/faculty/cv/bernstein.pdf [https://perma.cc/8UTQ-CFQX] (last visited Feb. 3, 2018).

[138] BERNSTEIN, *supra* note 67, at 125.

[139] *See id.* at 23.

[140] *See supra* text accompanying notes 63–65.

[141] BERNSTEIN, *supra* note 67, at 23. *But see* Kens, *supra* note 77, at 409 n.19 ("Those who claim that a conspiracy of unions and large bakeries produced the Bakeshop Act provide no primary support."); Paul Kens, *Kens on Bernstein, 'Rehabilitating* Lochner*: Defending Individual Rights Against Progressive Reform,'* H-LAW (June 2013), https://networks.h-net.org/node/16794/reviews/17301/kens-bernstein-rehabilitating-lochner-defending-individual-rights [https://perma.cc/WM5E-DPLN] (reiterating that

This version of the story re-casts the *Lochner* majority as heroes, weeding out the type of paternalist and protectionist legislation that typified the Progressive era in a crusade to preserve individual liberty. It also shades Justice Holmes in a villainous light, lambasting his caustic dismissal of the majority's analysis and accusation of laissez-faire influence as being "beyond the pale."[142] Au contraire, says Bernstein: *Lochner*—and the liberty of contract more generally—was based on a long tradition of natural rights jurisprudence embedded in the Founders' understanding of liberty and property rights,[143] as well as persistent judicial hostility at the time to laws perceived as "class legislation."[144] Therefore, Justice Peckham was not crudely forcing his "particular economic theory"[145] upon the nation; he was evaluating and applying a plausible reading of the Fourteenth Amendment.[146]

In addition to rehabbing *Lochner*'s image, Bernstein defends the men behind the movement, from Field to Peckham to the Four Horsemen of the New Deal.[147] In combatting the traditional narrative adopted from the "sociological jurisprudence" school of Progressive intellectuals, which barraged the liberty of contract and its practitioners with a flurry of pro-labor, hyper-majoritarian rhetoric throughout the early twentieth century,[148] Bernstein argues that these conservative Justices were not nearly as activist as history portrays them to be—in fact, the Supreme Court upheld many more economic regulations than it invalidated between *Allgeyer* and *West Coast Hotel*.[149] Moreover, the Court intervened in cases that modern liberals and civil rights advocates would normally celebrate, as it occasionally invoked the liberty of contract to protect the rights of women workers[150] and African American property owners.[151] Finally, Bernstein combats the *Lochner* dragon by denying its very existence. While Progressive lawyers and politicians criticized the case in the years

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despite Bernstein's depiction of events, New York's bakers unions were in fact "politically powerless"). *See also* Ian Millhiser, *The Most Incompetent Branch*, 23 GEO. MASON L. REV. 507, 511–12 (2016) (echoing Kens's argument in response to similar speculation). Indeed, the idea that a late-nineteenth-century bakers' union possessed and wielded great influence over a major state legislature should be enough to give anyone pause.

[142] BERNSTEIN, *supra* note 67, at 35–37.

[143] *Id.* at 17–20.

[144] *Id.* at 14–16.

[145] *See supra* text accompanying note 84 (highlighting Justice Holmes's sentiments toward the interaction between the Constitution and economic theories).

[146] *See* David Bernstein, *Amar on Lochner*, VOLOKH CONSPIRACY (Sept. 12, 2012, 3:04 PM), http://volokh.com/2012/09/12/amar-on-lochner/ [https://perma.cc/YN9K-B9HF].

[147] *See generally* BERNSTEIN, *supra* note 67 (favoring those who have advocated for limited government throughout history while tracing *Lochner's* influence on modern constitutional jurisprudence).

[148] *Id.* at 40–44.

[149] *Id.* at 120–21 ("[T]he Supreme Court had upheld the vast majority of laws that came before it, allowing significant, though not unlimited, room for the regulatory state's growth . . . .").

[150] *Id.* at 56–72.

[151] *Id.* at 73–89.

following its birth,[152] it was hardly the era-defining tyrant it is treated as today. Indeed, *Lochner* was rarely viewed as unique from its liberty of contract brethren, and the majority in *West Coast Hotel* did not even bother to expressly overrule *Lochner* when the time came for its doctrine's defeat.[153] Rather, *Lochner*'s demonization emerged as a convenient shorthand for Progressive intellectuals and their liberal heirs,[154] who gravitated to Justice Holmes's (flawed) dissent to champion his brand of judicial restraint as emblematic of how judges should carry themselves in reviewing economic legislation.[155]

Of course, Bernstein cushions his revisionism by insisting that he does not "take any position in the book as to the correctness of *Lochner* beyond implicitly arguing that it was a plausible interpretation of the Fourteenth Amendment when it was decided[,]"[156] and that he "draws no normative conclusions about current constitutional practice."[157]

This suggests an incredible feat of devil's advocacy. Bernstein has authored over a dozen revisionist articles pertaining to *Lochner* specifically and economic rights more generally.[158] As Akhil Reed Amar has quipped, "The title 'Rehabilitating *Lochner*' is a quite misleading one" if all Bernstein meant to say was that "*Lochner*, though wrongly decided, was part of a series of cases not all of which are terrible."[159] In reality, "The title rather clearly implies the correctness of *Lochner*."[160]

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[152] For prominent examples, see Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 366–68 (1911); Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 414–16 (1905); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 502–03 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 479–81 (1909). Outside the realm of scholarly critique, Theodore Roosevelt may have been the most vocal in his disdain for the *Lochner* decision. *See* Victoria F. Nourse, *A Tale of Two* Lochners: *The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 779–84 (2009).

[153] Perhaps as a show of consensus for Bernstein's historicism, this argument has become increasingly commonplace among those to his left. *See, e.g.*, Hunter, *supra* note 33, at 37 ("[*Lochner*] was rarely cited in subsequent cases, and ultimately set aside without acknowledgement or fanfare.").

[154] BERNSTEIN, *supra* note 67, at 113–18.

[155] *Id.* at 45–46.

[156] Bernstein, *supra* note 146.

[157] David E. Bernstein, *A Reply to Professor George W. Liebmann's Review of REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM*, 21 LAW & POL. BOOK REV. 424, 424 (2011), http://www.lawcourts.org/LPBR/reviews/bernstein0711r.htm [https://perma.cc/Y7T2-HB65]. Presumably, this is to preserve Bernstein's book as an academic and historical work and distance itself from the sort of outright advocacy adopted by other *Lochner*-friendly polemics that have been released this decade. *See generally* CLARK M. NEILY, III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013); DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010).

[158] *See* Bernstein, *supra* note 137.

[159] Akhil Reed Amar, *A Too-Quick Response to David and Ilya*, VOLOKH CONSPIRACY (Sept. 13, 2012, 8:08 AM), http://volokh.com/2012/09/13/a-too-quick-response-to-david-and-ilya/ [https://perma.cc/WZ2B-FPFW].

[160] *Id.* Moreover, Bernstein is implying that he only cares to defend the reasoning of *Lochner* (and not its result). If that were the case, why not name the book "*Rehabilitating Peckham*"?

But what Bernstein will not commit to, Randy Barnett will proudly say. Barnett, a "rock-star" of the legal right,[161] has done more than anyone this century to bring Epstein and Siegan's libertarian rebellion to the forefront of conservative jurisprudence.[162] Barnett earned his reputation as the "intellectual godfather of the argument that the [Affordable Care Act] is unconstitutional"[163] by framing the legal challenge in terms of individual liberty rather than on federalism grounds,[164] invigorating the Tea Party movement's resistance to healthcare reform[165] and in turn making him "a hero to the conservative legal establishment."[166] This episode was consistent with Barnett's career, as he has explicitly advocated for a return of the liberty of contract and an embrace of unenumerated rights.[167]

Indeed, "Barnett believes the Constitution exists to secure inalienable property and contract rights for individuals."[168] This break with Borkian conservatives is not merely cosmetic; it carries an incalculable economic impact if five Justices were to ever adopt Barnett's reading.[169] Under this vision, modern social welfare laws—wage floors, overtime provisions, worker safety regulations, bans on yellow-dog contracts, and other government interventions that we frequently take for granted—are likely

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[161] Garrett Epps, *Reagan's Court vs. the Libertarians'*, AM. PROSPECT (Sept. 16, 2013), http://prospect.org/article/reagans-court-v-libertarians [https://perma.cc/Z7HN-RXMZ].

[162] *See* Beutler, *supra* note 134.

[163] Kate Zernike, *Proposed Amendment Would Enable States to Repeal Federal Law*, N.Y. TIMES (Dec. 19, 2010), http://www.nytimes.com/2010/12/20/us/politics/20states.html?_r=0 [https://perma.cc/R4UW-5Q4J].

[164] *See* Randy Barnett, Opinion, *Randy Barnett: We Lost on Health Care. But the Constitution Won.*, WASH. POST (June 29, 2012), https://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story.html?utm_term=.5071b44bda1d [https://perma.cc/8W22-B8UJ] ("Granting Congress this power would gravely limit the liberties of the people."); Randy E. Barnett, *Obamacare's Individual Mandate Is a Dangerous New Federal Power*, WASH. EXAMINER (Feb. 15, 2011, 12:00 AM), http://www.washingtonexaminer.com/obamacares-individual-mandate-is-a-dangerous-new-federal-power/article/39119 [https://perma.cc/Q8NV-ZTR9] (arguing that "[e]conomic mandates are an unnecessary and improper means to the regulation of interstate commerce" because they encapsulate "a power to conscript Americans to enter into contracts with private companies").

[165] *See* Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281, 282 (2011), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1069&context=nulr_online [https://perma.cc/XR6P-FB9B].

[166] Beutler, *supra* note 134.

[167] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 211–14, 319–33 (2004); *see also* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 5 (2012) ("The evidence that the Constitution protects rights of private property and contract is overwhelming."). Note, however, that Barnett would recognize economic liberty under the dormant Privileges or Immunities Clause of the Fourteenth Amendment rather than through substantive due process. *See* Barnett, *supra* note 24, at 333 ("Reverse *Slaughter-House* and the 'evils' of *Lochner* would simply melt away . . . .").

[168] Beutler, *supra* note 134.

[169] *Id.*

unconstitutional at the federal level.[170] Some one hundred years later, Barnett the Advocate is nothing less than Peckham the Justice resuscitated, summoning the dragon from its dwelling.

Bernstein's inquisitiveness and Barnett's militancy would remain radical sentiments under Bork and Scalia's gospel of judicial restraint,[171] muted to the masses as mere rebel yells in the night, but Colby and Smith argue that originalism has steadily honed an activist edge over the last decade.[172] They offer two reasons for this groundswell in libertarian influence.[173] The first factor is "generational," the simple passage of time.[174] *Roe v. Wade* was decided over forty years ago, and the last generation of originalists rose to prominence free of the Warren Court menace.[175] Instead, these advocates came of age in an era of a conservative-dominated Court, and their evolution closely resembles the period in which liberals shed their mantra of New Deal-era restraint for a more activist blend of jurisprudence.[176] The fiercest legal battles of recent years have certainly cultivated an activist sentiment among conservatives, including landmark decisions regarding campaign spending,[177] gun control,[178] and healthcare legislation.[179]

This gives way to the second factor: the theoretical maturity of originalism from emphasizing the "original intent" of the Framers to the "original meaning" of the Constitution's text.[180] These "new originalists," as Colby and Smith broadly label them, treat originalism as an interpretative theory of textual meaning rather than a normative theory of adjudication;[181] as such, they have conceded that the Constitution's text is "*objectively* vague and abstract," and thus are more willing to "vest[] judges with a great deal of interpretive discretion."[182] This results in "a much

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[170] *Id.*

[171] *Id.*

[172] Colby & Smith, *supra* note 30, at 588.

[173] *Id.*

[174] *Id.* at 588–90.

[175] *Id.* at 588.

[176] *Id.* at 588–89; *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. L.J. & PUB. POL'Y 599, 609 (2004) (observing the "loosening of the connection between originalism and judicial deference to legislative majorities.").

[177] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[178] *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

[179] *See* NFIB v. Sebelius, 567 U.S. 519 (2012).

[180] Colby & Smith, *supra* note 30, at 591 (original emphasis omitted); *see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) (explaining that originalists are increasingly seeking "the original meaning of the text, not what the original draftsmen intended"); BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 244 (2014) (detailing Scalia's break from Bork's school of "original intent"-based originalism). Somewhat helpfully, historian Jonathan Gienapp refers to this bifurcation between original intent and public meaning as "Originalism 1.0" and "Originalism 2.0." *See* Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AM. HIST. (Mar. 20, 2017), http://www.processhistory.org/originalism-history/ [https://perma.cc/9K6Y-9TDH].

[181] Colby & Smith, *supra* note 30, at 592.

[182] *Id.* (alteration in original).

clearer path to resuscitating *Lochner*," as new originalism allows for a broader interpretative scope than its previous "focus on the narrow intentions and expectations of the Framers," which categorically denied the existence of unenumerated rights.[183] "If the proper interpretative quest is for the objective meaning" that a reasonable observer would find in the Constitution's text at the time of its enactment, then such an embargo *must* fail.[184] Indeed, a reasonable observer in the nineteenth century may very well have reached the same conclusion as Barnett regarding the Constitution's implicit protections of economic rights. The Ninth Amendment itself contemplates extra-textual liberties.[185]

Ironically, no lawyer may be more responsible for the return of judicial activism to the right than the man most committed to extinguishing it: Chief Justice John Roberts.[186] Whereas mainstream conservatives once celebrated his elevation to the Court, Barnett cast a skeptical eye upon Roberts's coronation.[187] "Who is John Roberts?" Barnett asked in 2005, "[w]e know nothing about what he stands for."[188] When the Chief failed to invalidate the Affordable Care Act on multiple occasions[189] and subsequently enraged the conservative establishment,[190] Barnett responded with a call to arms. "[S]electing judges with the judicial mindset of 'judicial restraint' and 'deference' to the majoritarian branches leads to the results we witnessed in *NFIB* and *King*," he warned.[191] "[I]f conservative Republicans want a different performance from the judiciary in the future, they must vet their presidential candidates to see whether they understand this point."[192]

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[183] *Id.* at 593.

[184] *Id.*

[185] U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others retained by the people.*") (emphasis added).

[186] *See generally Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John Roberts) ("Judges are like umpires. Umpires don't make the rules, they apply them."); *see also* Damon Root, *How Judicial Restraint Shaped John Roberts'* [sic] *ObamaCare Decision*, REASON.COM (June 29, 2012, 9:30 AM), http://reason.com/archives/2012/06/29/how-judicial-restraint-shaped-john-rober [https://perma.cc/6767-F7WL].

[187] Beutler, *supra* note 134.

[188] *See id.*; Randy Barnett, *Who is John Roberts? Who Knows?*, VOLOKH CONSPIRACY (July 20, 2005, 1:07 PM), http://volokh.com/2005/07/20/who-is-john-roberts-who-knows/ [https://perma.cc/U5PV-W6KV].

[189] *See* NFIB v. Sebelius, 567 U.S. 519 (2012); King v. Burwell, 135 S. Ct. 2480 (2015).

[190] *See, e.g.*, The Editors, *Roberts Gets It Wrong Again*, NAT'L REV. (June 25, 2015), http://www.nationalreview.com/article/420310/roberts-gets-it-wrong-again-editors [https://perma.cc/4MY8-GH88].

[191] Randy Barnett, *The Definition of Insanity: Jeb Bush Still Favors Appointing Judges "with a Proven Record of Judicial Restraint,"* WASH. POST: VOLOKH CONSPIRACY (June 27, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/27/jeb-bush-still-favors-appointing-judges-with-a-proven-record-of-judicial-restraint/?utm_term=.f69c9b78ec35 [https://perma.cc/W5CH-ATBT].

[192] *Id.*

Barnett's message is clear. The Court needs less John Robertses in its chambers and more Rufus Peckhams.

B. The Converts

So far, we have discussed the Rehabilitationists' influence in a mostly academic sense. With all due respect to this medium, economic due process will never complete its comeback if it is confined to avant-garde law review articles or second-rate treatment on the Federalist Society's speaking circuit. But, Barnett's and Bernstein's efforts have proven fruitful this decade in winning over several prominent advocates that can solidify the liberty of contract's place in mainstream constitutional discourse.

While many members of the judiciary likely harbor reservations towards the post-*Williamson* level of deference afforded to economic legislation, only recently have judges displayed the confidence to treat the rational basis test with outward, *Lochner*-driven hostility. Consider the recently retired Judge Janice Rogers Brown of the D.C. Circuit Court of Appeals, a former Supreme Court short-lister during the George W. Bush administration[193] and a controversial figure amongst the legal establishment.[194] It is not particularly surprising that Judge Brown was the one to fire the first salvo, given that she has praised *Lochner* in a speech and concomitantly described the New Deal as the "triumph of our own socialist revolution,"[195] but the tone of her opinion in *Hettinga v. United States*[196] is still jarring. Judge Brown wrote that the milk regulation at issue in *Hettinga*, which her court upheld under rational basis review, "reveals an ugly truth: America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers."[197] The courts, she added, "[H]ave been negotiating the terms of surrender since the 1930s," and the Supreme Court in particular has "abdicated its constitutional duty to protect economic rights completely."[198] She further called into question the entire post-Depression economic order, including modern welfare programs and the regulatory

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[193] Marc Kaufman, *Possible Nominees to the Supreme Court*, WASH. POST (July 1, 2005, 11:12 AM), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100756.html [https://perma.cc/G2Z9-YNCG].

[194] *See* David D. Kirkpatrick, *New Judge Sees Slavery in Liberalism*, N.Y. TIMES (June 9, 2005), http://www.nytimes.com/2005/06/09/politics/new-judge-sees-slavery-in-liberalism.html [https://perma.cc/C8UY-8TSZ]; Jeffrey Rosen, *Second Opinions*, NEW REPUBLIC (May 4, 2012), https://newrepublic.com/article/103090/conservative-judges-justices-supreme-court-obama [https://perma.cc/EX7Y-NV8L].

[195] Brown, *supra* note 131.

[196] 677 F.3d 471 (D.C. Cir. 2012).

[197] *Id.* at 480 (Brown, J., concurring). For a different perspective on the realities of cowboy economics, *see* Mark A. Lause, *The Cowboy Class Wars*, JACOBIN (Aug. 29, 2016), https://www.jacobinmag.com/2016/08/cowboys-wild-west-manifest-destiny-expansion/ [https://perma.cc/4KSC-R22B].

[198] *Hettinga*, 677 F.3d at 480–81.

state.[199] Judge Brown glowingly cited Barnett and one of the Four Horsemen's dissents in *Nebbia* before concluding her opinion on a dire note: "Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more."[200]

Without exaggeration, this was a spirited call for the return of *Lochner* from a judge sitting on what is perceived to be the second most powerful court in the country,[201] and it was done so in the most unabashedly libertarian rhetoric since Justice Peckham warmed a seat.

Recent support from the judiciary has been more nuanced, but also more influential. Judge Don Willet of the Fifth Circuit Court of Appeals (and former Justice of the Supreme Court of Texas) is famous on many fronts, known for both his large following on social media and his inclusion on President Donald Trump's short list for nomination to the Supreme Court of the United States.[202] In 2015, Willett expressed his support for *Lochner* in a series of footnotes to a case in which he invalidated an occupational licensing law for failing rational basis review.[203] On the same day that Chief Justice Roberts read his dissent from the bench in *Obergefell v. Hodges*,[204] in which the Chief rhetorically tied the majority's recognition of a fundamental right to marriage for same-sex couples to the judicial activism of the *Lochner* era,[205] thereby evincing the mainstream conservative treatment of substantive due process, Willett excoriated "[t]he *Lochner* bogeyman [a]s a mirage."[206] Willett espoused the major themes of the Rehabilitationist movement—the relative infrequency of legislative invalidation before the New Deal, the extremism of Justice Holmes's dissent, and the existence of economic due process cases that pre-dated *Lochner*—and cited Bernstein's *Rehabilitating Lochner* as

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[199] *Id.* at 481 ("[T]he Constitution created the countermajoritarian difficulty in order to thwart more potent threats to the Republic: the political temptation to exploit the public appetite for other people's money—either by buying consent with broad-based entitlements or selling subsidies, licensing restrictions, tariffs, or price fixing regimes to benefit narrow special interests.") (original emphasis omitted).

[200] *Id.* at 481–83.

[201] *See, e.g.*, Richard Wolf, *Obama, Dems Make Mark on Second Most Powerful Court*, USA TODAY (Dec. 9, 2013, 2:22 PM), https://www.usatoday.com/story/news/politics/2013/12/09/dc-appeals-court-obama-senate/3909961/ [https://perma.cc/CA4T-PRLU].

[202] Brandi Grissom, *Justice Don Willett, the Boy from Talty, Takes Twitter by Storm, and Maybe SCOTUS, Too*, DALLAS NEWS (May 20, 2016), http://www.dallasnews.com/news/politics/2016/05/20/justice-don-willett-the-boy-from-talty-takes-twitter-by-storm-and-maybe-scotus-too [https://perma.cc/5RUE-WJHK].

[203] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015); *see, e.g.*, *id.* at 94 n.11, 97 n.33.

[204] 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting); Ariane de Vogue, *Roberts Issues Stern Dissent in Same-Sex Marriage Case*, CNN (June 26, 2015, 5:52 PM), http://www.cnn.com/2015/06/26/politics/john-roberts-gay-marriage-dissent/index.html [https://perma.cc/83F5-27HU].

[205] *Obergefell*, 135 S. Ct at 2617–18, 2621 (Roberts, C.J., dissenting).

[206] *Patel*, 469 S.W.3d at 94 n.11.

persuasive authority.[207] Even more revealing is Willett's citation of Colby and Smith's article, for it demonstrates Willett's awareness of his place within a growing movement:

> A wealth of contemporary legal scholarship is reexamining *Lochner*, its history and correctness as a matter of constitutional law, and its place within broader originalist thought, specifically judicial protection of unenumerated rights such as economic liberty. Long story short: Legal orthodoxy about *Lochner* is evolving among many leading constitutional theorists.[208]

Activist arguments have also found a home among prominent members of the commentariat. George Will, a Pulitzer Prize-winning columnist for the Washington Post and a "leading conservative voice for decades,"[209] once preached the standard sermon in reverence of judicial restraint[210] but reversed course upon reading and reviewing Bernstein's book.[211] In fact, Will now believes that "the court correctly decided *Lochner v. New York*," and he is convinced that reviving the liberty of contract would provide "another step in the disarmament" of regulatory government.[212] "Many judges, . . . in practicing what conservatives have unwisely celebrated as 'judicial restraint,' have subordinated liberty to majority rule," Will

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[207] *Id.* at 99 n.46.

[208] *Id.* at 101 n.46 (citing BERNSTEIN, *supra* note 67; Colby & Smith, *supra* note 30). For a fawning, front-page profile of Willett and his embrace of *Lochner* revisionism, see Alan Greenblatt, *Don Willett's Lone Star Legal Show*, GOVERNING (Aug. 2017), http://www.governing.com/topics/public-justice-safety/gov-don-willett-conservative-justice.html [https://perma.cc/FB9B-RS72]. For a scathing depiction from across the aisle, see Ian Millhiser, *The Radical Ideology of This Trump Nominee Makes Even the Most Conservative SCOTUS Justices Uneasy*, THINKPROGRESS (Oct. 10, 2017, 8:00 AM), https://thinkprogress.org/trumps-most-radical-nominee-since-neil-gorsuch-02d1bcabc8e0/ [https://perma.cc/NG7D-WZDP].

[209] *Conservative Writer George Will Drops out of GOP over Trump*, AP (June 26, 2016, 9:32 PM), http://bigstory.ap.org/article/5cab8abbbdcf4d868ea38f02abcdd7ed/conservative-writer-george-will-drops-out-gop-over-trump [https://perma.cc/EW7T-KS9V].

[210] *See, e.g.*, George Will, *How Irksome that We Allow Judges to Make Our Laws*, SUNSENTINEL (June 2, 1996), http://articles.sun-sentinel.com/1996-06-02/news/9606030105_1_punitive-awards-due-process-punitive-damages [https://perma.cc/4YYQ-Z9W8] ("In 1914, early in a career that established him as America's greatest jurist never elevated to the Supreme Court, Learned Hand, a believer in democracy and hence in judicial restraint, denounced judicial activism by conservative judges who used the Constitution's guarantee of 'due process of law' to overturn laws that regulated economic transactions. This was 'substantive due process,' the tendentious doctrine that many government actions distasteful to judges can be baldly declared to be the results of constitutionally impermissible processes."). *Cf.* BERNSTEIN, *supra* note 67, at 44 (exemplifying *Lochner* revisionists' modern treatment of Judge Hand).

[211] George F. Will, Opinion, *Why Liberals Fear the 'Lochner' Decision*, WASH. POST (Sept. 7, 2011), https://www.washingtonpost.com/opinions/why-liberals-fear-the-lochner-decision/2011/09/06/gIQAZapUAK_story.html?utm_term=.c2b8f1cfef5c [https://perma.cc/76UJ-N3L3]. This reversal is consistent with Will's ideological shift to economic libertarianism. *See* Nick Gillespie & Matt Welch, *George Will's Libertarian Evolution*, REASON (Dec. 2013), http://reason.com/archives/2013/11/13/george-wills-libertarian-evolu [https://perma.cc/WR37-PPN9].

[212] Will, *supra* note 211.

laments, which "serves liberalism by leaving government's growth unrestrained."[213] Following his newfound dogma to its logical conclusion, Will has answered Barnett's battle cry by posing a litmus test of his own: "The next Republican president should ask this of potential court nominees: Do you agree that *Lochner* correctly reflected the U.S. natural rights tradition and the Ninth and 14th amendments' affirmation of unenumerated rights?"[214] This, presumably, would prevent another John Roberts from donning a robe.

Finally, the Rehabilitationists found their most powerful ally in an elected official who was always destined for the cause. Senator Rand Paul of Kentucky, perhaps the most libertarian member of the United States Senate,[215] referred to *Lochner* as a "wonderful decision" during a speaking filibuster in 2013, specifically praising its expansion of unenumerated rights.[216] In lockstep with Justice Field, Paul believes such rights to be "unlimited" because "[y]ou got them from your Creator. These are natural-born rights, and no democracy should be able to take these away from you."[217] Unsurprisingly, Paul cited Barnett's and Bernstein's works as major influences.[218] "I'm a judicial activist when it comes to *Lochner*," Paul later admitted in a 2015 speech.[219] "If you're for judicial restraint, what happens when the legislature does bad things?"[220]

A pattern has clearly emerged. Bernstein's synthesis of revisionist scholarship has provided the means by which anti-regulatory advocates may adopt judicial activism as their creed, and Barnett provides the persuasion to unleash the dragon from its cave. With momentum on their side, there is every reason to believe the Rehabilitationist movement will continue to earn converts from the legal and political right.

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[213] George F. Will, Opinion, *George Will: Judicial Activism Isn't a Bad Thing*, WASH. POST (Jan. 22, 2014), https://www.washingtonpost.com/opinions/george-will-judicial-activism-isnt-a-bad-thing/2014/01/22/31b41a12-82c7-11e3-8099-9181471f7aaf_story.html?utm_term=.0f269524d834 [https://perma.cc/ABH2-KLX8].

[214] George F. Will, Opinion, *The 110 Year-Old Case that Still Inspires Supreme Court Debates*, WASH. POST (July 10, 2015, 8:35 PM), https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa_story.html [https://perma.cc/UL7A-EVGF].

[215] *See* David Boaz, *Is Rand Paul a Real Libertarian?*, NEWSWEEK (Apr. 6, 2015, 3:52 PM), http://www.newsweek.com/rand-paul-real-libertarian-319959 [https://perma.cc/R99A-67XE].

[216] 159 CONG. REC. S1161 (daily ed. Mar. 6, 2013) (statement of Sen. Rand Paul).

[217] *Id.*

[218] *Id.*

[219] Andrew Prokop, *The Supreme Court's Infamous* Lochner *Era' Ended in the 1930s. Rand Paul Wants It Back.*, VOX (Jan. 17, 2015, 10:10 AM), http://www.vox.com/2015/1/17/7628543/rand-paul-lochner [https://perma.cc/C99F-KH8B].

[220] *Id.*

III. EARLY BATTLES: LICENSING LAWS AS *LOCHNER*'S TROJAN HORSE

One could argue that any talk of reviving *Lochner* is, at this point, purely hypothetical, and mostly consists of liberal handwringing. None of the Justices on the Supreme Court subscribe to a theory of economic liberty that is protected by the Fourteenth Amendment,[221] and the *modus operandi* of conservative credence remains judicial restraint.[222] What, then, is the existential threat?

In this Part, the author argues the anti-protectionist decisions that have bubbled beneath the Court's surface are a sort of low-calorie *Lochner*, willing to restore heightened scrutiny to economic legislation. Admittedly, this concept of "rational basis with [a] bite" is not novel,[223] nor is the suspicion that lower courts are channeling *Lochner*.[224] While previous observations have focused on lower courts' role in this jurisprudential shift, this author examines the actors behind the scene. With little variation, the legal challenges to these statutes are led by libertarian-minded lawyers that have a greater goal in mind than the invalidation of individual rent-seeking legislation; they want to bring Barnett's and Bernstein's work to completion from the ground up. These foot soldiers represent the "young[] generation of elite conservative lawyers" that can change the composition of the

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[221] The radicalism of the Rehabilitationists' views, at least in the eyes of the modern Supreme Court, can be demonstrated through the jurisprudence of Justice Clarence Thomas. Justice Thomas, often considered to be the most conservative Justice on the Court today, almost certainly disagrees with the legal framework of the modern regulatory state that emerged as a result of Progressives' expansive reading of the Commerce Clause. *See* Gonzales v. Raich, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) ("Commerce, or trade, stood in contrast to productive activities like manufacturing or agriculture."); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases."); United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) ("[T]he term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture."). But, Justice Thomas has ardently rejected the doctrine of substantive due process. *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 249 (2012) (Thomas, J., concurring) ("[T]he Fourteenth Amendment's Due Process Clause is not a secret repository of substantive guarantees against unfairness.") (internal quotation marks omitted). As previously demonstrated, both concepts—the general distaste for government intervention and the receptiveness for the activist shift in conservative jurisprudence—must be wed to truly rehabilitate *Lochner*. *See supra* notes 171–192 and accompanying text.

[222] *See, e.g.*, Matthew J. Franck, *The Freewheelin' George Will*, NAT'L REV.: BENCH MEMOS (July 13, 2015, 12:45 PM), http://www.nationalreview.com/bench-memos/421102/freewheelin-george-will-matthew-j-franck [https://perma.cc/BHY9-BU37] (stating "there is not a 'no rent-seeking' provision in the Constitution," and that "[w]ho says yes to *Lochner* cannot say no to *Obergefell*").

[223] Menashi & Ginsburg, *supra* note 39, at 1066–67. *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) ("Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination."); *see also* Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1072 (2013) (articulating the concept as "a more exacting conception of legitimate governmental interests and a more stringent tailoring inquiry").

[224] *See, e.g.*, Brianne J. Gorod, Note, *Does* Lochner *Live?: The Disturbing Implication of* Craigmiles v. Giles, 21 YALE L. & POL'Y REV. 537, 538 (2003).

Court in the next "generation or two,"[225] and release the dragon from its cave bit by bit, case by case.

A. When the Reactionaries Are Reasonable

In the wake of the New Deal, the Supreme Court afforded almost unlimited deference to states to regulate their occupational markets.[226] In 1963, it entrenched itself even further by upholding a Kansas law that limited the profession of debt-adjusting to lawyers.[227] This case, *Ferguson v. Skrupa*, was aimed directly at overturning one of the *Lochner*-era's most reviled decisions, *Adams v. Tanner*,[228] which had invalidated a state law prohibiting private employment agencies from charging upfront fees to people seeking work.[229] Even though this industry was baldly predatory, levying immediate costs on penniless workers that were desperate for work, the Court in *Adams* held that while such agencies were subject to regulation, the state could not flat-out prohibit its employees from following a "distinctly useful calling."[230] *Ferguson* gutted the last vestiges of natural rights-based economic due process by declaring that the Court was no longer "willing to draw lines by calling a law 'prohibitory' or 'regulatory.'"[231]

Williamson's and *Ferguson*'s brand of hyper-deferential jurisprudence remained the status quo for the next forty years, and economic liberty reached its lowest ebb as conservative jurists disavowed unenumerated protections.[232] Laws that appeared solely protectionist in nature were upheld so long as "the discriminatory legislation arguably advance[d] either the general welfare or a public interest,"[233] of which consumer safety and health interests regularly fell under. But in the new millennium, lower courts have been increasingly reluctant to identify public interests in licensing laws that facially favor one group of citizens over another.

In 2002, the Sixth Circuit delivered the first major victory for the anti-licensing movement. In *Craigmiles v. Giles*, the court considered a challenge to a Tennessee law that restricted anyone but a state-licensed funeral director from selling caskets.[234] The statute did not originally include any mention of casket transactions, but it was

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[225] David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J.F. 287, 296 (Dec. 5, 2016), www.yalelawjournal.org/forum/the-due-process-right-to-pursue-a-lawful-occupation-a-brighter-future-ahead [https://perma.cc/9GT9-2X2U].

[226] *See, e.g.*, *supra* notes 112–113 and accompanying text.

[227] *See* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[228] *See id.* at 728, 731.

[229] Adams v. Tanner, 244 U.S. 590, 591, 596–97 (1917).

[230] *Id.* at 593–94. The Court acknowledged that this industry was prone to abuse, but it reiterated that "this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." *Id.* at 594.

[231] *Ferguson*, 372 U.S. at 732.

[232] *See supra* notes 124–127 and accompanying text.

[233] Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) (Tymkovich, J., concurring).

[234] Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002).

later amended to include the sale of funeral merchandise.[235] Additionally, the requirements for obtaining a license were quite substantial,[236] and the plaintiffs—who sold caskets but performed no funeral services—argued that these requirements were arbitrary, unnecessary, and existed solely to restrict competition for the benefit of covered funeral homes.[237]

The Sixth Circuit agreed: "adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition"[238] because "[t]his specific action of requiring licensure . . . appears directed at protecting licensed funeral directors from retail price competition."[239] While the court acknowledged that "[r]ational basis review[] . . . does not require the best or most finely honed legislation to be passed,"[240] it rejected the state's arguments that there was a reasonable relationship between the legislation in question and any legitimate public interest, such as consumer protection or public health.[241] Consequently, the law failed even the most deferential level of scrutiny, as "protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[242] The plaintiffs were thus vindicated on both Due Process and Equal Protection grounds.[243]

The *Craigmiles* opinion has resulted in a circuit split as courts have examined similar licensing schemes, and it is one that anti-regulatory advocates appear to be winning. In *Powers v. Harris*, the Tenth Circuit upheld a casket retailing law similar to the one considered in *Craigmiles*.[244] But rather than attempt to distinguish the facts of the case from what the Sixth Circuit examined, the Tenth Circuit simply disagreed with its findings: "absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."[245] The court warned that "adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences,"[246] which could "paralyze state governments if [judges]

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[235] *Id.*

[236] To become a licensed funeral director under Tennessee's Funeral Directors and Embalmers Act, one was required to "complete *either* one year of course work at an accredited mortuary school *and* then a one-year apprenticeship with a licensed funeral director *or* a two-year apprenticeship." *Id.* (emphasis in original).

[237] *Id.* at 222–23.

[238] *Id.* at 225.

[239] *Id.* at 227.

[240] *Id.*

[241] *Id.* at 225–28.

[242] *Id.* at 224.

[243] *Id.* at 228–29 ("None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment."). The court declined to review the plaintiff's Privilege and Immunities argument, thereby avoiding the *Slaughter-House* quandary. *Id.* at 229.

[244] Powers v. Harris, 379 F.3d 1208, 1211–12, 1225 (10th Cir. 2004).

[245] *Id.* at 1221.

[246] *Id.* at 1222.

undertook a probing review of each of their actions, constantly asking them to 'try again.'"[247]

In support of its argument that economic protectionism could itself be a legitimate public interest, the Tenth Circuit cited four cases—*Williamson* among them—where the Supreme Court ostensibly endorsed such a conclusion.[248] This was a dubious assertion, though. As a concurring opinion noted, those cases still "rest[ed] [up]on [the] fundamental foundation" that the statutes in question could *arguably* protect the general welfare.[249] To the contrary, "[n]o case holds that the bare preference of one economic actor while furthering no greater public interest advances a legitimate state interest."[250] The Tenth Circuit nonetheless teased that "such a libertarian paradise may be a worthy goal," and added insult to injury by parroting Justice Holmes: "Plaintiffs must turn to the Oklahoma electorate for its institution, not us."[251]

Powers generated swift and vigorous disgust from libertarian stalwarts.[252] "[T]he Tenth Circuit's rule means that laws enacted solely for the *private* benefit of particular interest groups satisfies the rational basis test," ensuing scholarship complained, proclaiming that "[s]uch a holding is inconsistent with the principle of lawfulness[.]"[253] However, subsequent cases have rejected the Tenth Circuit's conclusion in favor of the reasoning extant in *Craigmiles*.

In *Merrifield v. Lockyer*, the Ninth Circuit determined that a California licensing law regarding pesticide removal was not rationally related to a legitimate public interest insofar as the law exempted persons controlling "vertebrate pests" but did not cover mice, rats, or pigeons.[254] The "irrational singling out of three types of vertebrate pests from all other vertebrate animals" constituted economic

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[247] *Id.* at 1218.

[248] *Id.* at 1220–21 (citing Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109 (2003); Nordlinger v. Hahn, 505 U.S. 1, 18 (1992); City of New Orleans v. Dukes, 427 U.S. 297, 298 (1976); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 491 (1955)).

[249] *Powers*, 379 F.3d at 1225 (Tymkovich, J., concurring); *see also* Menashi & Ginsburg, *supra* note 39, at 1079–85.

[250] *Powers*, 379 F.3d at 1226 (internal quotations marks omitted). Judge Tymkovich ultimately concurred in the ruling because "the funeral licensing scheme here furthers, however imperfectly, an element of consumer protection." *Id.* at 1226–27.

[251] *Id.* at 1222.

[252] *See, e.g.*, Timothy Sandefur, *Burying Economic Liberty*, CRIME & FEDERALISM (Jan. 11, 2005, 5:14 PM), http://federalism.typepad.com/crime_federalism/2005/01/burying_economi.html [https://perma.cc/474B-ZKE8] ("*Powers v. Harris* [is] probably the most disastrous case for economic freedom in the last seventy years."); Eugene Volokh, *Economic Liberty*, VOLOKH CONSPIRACY (Jan. 11, 2005, 11:46 AM), http://volokh.com/archives/archive_2005_01_07.shtml#1105465567 [https://perma.cc/5NQH-9K4Q] ("[T]he court of appeals held that, under its view of the Constitution, naked economic favoritism is quite permissible[.]").

[253] Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1035 (2006) (emphasis in original).

[254] Merrifield v. Lockyer, 547 F.3d 978, 980, 992 (9th Cir. 2008).

protectionism by the legislature,[255] which violated the Equal Protection rights of mice-intensive pest controllers.[256] "[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest," the court decreed.[257] Similarly, in 2013 the Fifth Circuit dispatched (yet another) casket retailing law as unrelated to a valid public interest.[258] While "economic protection . . . may well be supported by a post hoc perceived rationale,"[259] "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[260]

Notably, the Supreme Court has declined *certiorari* on the occupational licensing issue despite this widening circuit split.[261] Moreover, the fact patterns in the casket cases are substantially similar, which would normally make the issue ripe for settlement. This suggests that the Court itself is unsure of how to proceed on the matter, content instead to let the battles wage in the lower levels. And while such inertia appears to favor the status quo, preventing the opponents of rent-seeking licensing laws from achieving a fifty-state victory rather than individual, regional wins, the Court's reticence is allowing this movement to gain momentum in pursuit of its true ambition.

B. Wolves in Wool Attire, or Would-Be Dragon-Tamers

As previously mentioned, Barnett and Bernstein are not on the front line of the Rehabilitationist cause. With the exception of Barnett's starring role in the litigation of *Gonzales v. Raich*,[262] the two are merely influencers, constrained to academia and by the glacial pace of doctrinal evolution. They do not challenge the laws themselves; they do not fight the courtroom battles.

But there are plenty of soldiers willing to fight the good fight, supplied largely by the Institute for Justice ("IJ"), Pacific Legal Foundation ("PLF"), and, more tangentially, the Cato Institute—staunchly libertarian legal institutions that are in part funded (or founded) by the Koch brother corporate tandem.[263] The Cato

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[255] *Id.* at 991.

[256] *Id.* at 991–92.

[257] *Id.* 992 n.15; *see also id.* ("[W]e agree with the Sixth Circuit in *Craigmiles* and reject the Tenth Circuit's reasoning in *Powers v. Harris*.").

[258] St. Joseph Abbey v. Castille, 712 F.3d 215, 217, 227 (5th Cir. 2013).

[259] *Id.* at 222–23.

[260] *Id.* at 222.

[261] *See* Sandefur, *supra* note 253, at 1025.

[262] 545 U.S. 1, 23–33 (2005) (rejecting Barnett's argument that the Commerce Clause prohibits Congress from criminalizing the production and use of homegrown cannabis even if states approve its use for medicinal purposes).

[263] *See* Olivia Nuzzi, *Ron Paul Headlines One Koch Brothers Event—as Rand Paul Skips Another*, DAILY BEAST (Aug. 3, 2015, 1:01 AM), http://www.thedailybeast.com/articles/2015/08/03/ron-paul-headlines-one-koch-brothers-event-as-rand-paul-skips-another.html [https://perma.cc/MC42-LJAC]; *see also* Beutler, *supra* note 134.

Institute is a think tank that funds the research of many libertarian academics,[264] while the IJ and PLF employ members of Cato's roster to seek out and challenge statutes that implicate economic liberty or property rights.[265] The favorite targets of these outfits are the state licensing laws at issue in their ongoing campaign against protectionism; the cases discussed in the Fifth, Sixth, Ninth, and Tenth circuits all involved plaintiffs represented by either the IJ or PLF. But the licensing laws are mere skirmishes in comparison to the organizations' loftier goal: to restore economic due process as a recognized doctrine under the Fourteenth Amendment. Indeed, they fully intend to one day unleash the *Lochner* dragon and re-write the last 80 years of economic regulation.

Consider Clark M. Neily III, former Senior Attorney for the IJ and director of its Center for Judicial Engagement.[266] Neily certainly speaks the Rehabilitationists' language, rebuking most government activity in the economic sphere as "[c]urrying favor with rent-seeking special interests by saddling their competitors with anticompetitive business regulations," while dismissing the famed *Carolene Products* case as a "baseless decision."[267] The question going forward concerning economic liberty, Neily brazenly states, is "whether the government's willingness to misrepresent its true ends in court should entitle it to a free pass from the judiciary to violate the Constitution."[268] The IJ, which refers to the liberty of contract as "a freedom with deep roots in the common law" and describes *Lochner* in familiar revisionist prose,[269] has become "a proving ground for aspiring, ideologically committed lawyers" who wish to join Neily in toppling the modern regime.[270] IJ's co-founder Clint Bolick, a surprise nomination to the Arizona Supreme Court in 2016,[271] has exalted *Lochner* as "a celebration of freedom of enterprise and freedom

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[264] Both Barnett and Bernstein operate under the Cato umbrella, currently serving as a research fellow, *Randy E. Barnett*, CATO INST., https://www.cato.org/people/randy-barnett [https://perma.cc/MR48-FBZ6] (last visited Feb. 4, 2018), and adjunct scholar of the Institute, respectively. *David E. Bernstein*, CATO INST., https://www.cato.org/people/david-bernstein [https://perma.cc/MB29-RRUD] (last visited Feb. 4, 2018).

[265] *See, e.g.*, *Current Economic Liberty Cases*, INST. FOR JUST., http://ij.org/pillar/economic-liberty/?post_type=case [https://perma.cc/3PJ7-QJUF] (last visited Feb. 4, 2018).

[266] *Clark Neily*, CATO INST., https://www.cato.org/people/clark-neily [https://perma.cc/SX7P-U8P2] (last visited Feb. 4, 2018).

[267] Paul Larkin, David Bernstein, Randy Barnett & Clark Neily, *Economic Liberty and the Constitution: An Introduction*, HERITAGE FOUND. (Oct. 1, 2014), https://www.heritage.org/the-constitution/report/economic-liberty-and-the-constitution-introduction [https://perma.cc/92ZW-P7RY].

[268] *Id.*

[269] Lochner v. New York *(1905)*, INST. FOR JUST., http://ij.org/center-for-judicial-engagement/programs/engagement-in-action/lochner-v-new-york-1905/ [https://perma.cc/SY85-ECB5] (last visited Feb. 4, 2018); *id.* ("[T]he law [behind *Lochner*] was the product of a zealous lobbying effort on the part of large factory bakeries and their unionized staff who sought to limit competition from recent immigrants who made up for their lack of mechanized facilities by working longer hours.").

[270] Beutler, *supra* note 134.

[271] *See* Ian Millhiser, *The Most Chilling Political Appointment that You've Probably Never Heard of*, THINKPROGRESS (Jan. 6, 2016, 6:01 PM), https://thinkprogress.org/the-most-chilling-political-

of contract, and a repudiation of government paternalism and excessive regulation. It reflects a careful and proper balancing of freedom and the state's police power."[272]

But perhaps no one has spent more energy fighting for *Lochner* than Timothy Sandefur, a nearly fifteen-year veteran of the PLF and the current Vice President for Litigation at the equally libertarian Goldwater Institute.[273] Sandefur combines Barnett's zeal for unenumerated rights with Bernstein's bevy of scholarship, having written dozens of articles in law reviews and the Cato Institute's journals while challenging many licensing laws in court.[274] Fascinatingly, Sandefur, an atheist,[275] defends natural rights jurisprudence with an almost religious fervor, asserting its place as a "sound philosophical position" despite the frequency with which intellectuals "dismiss the notion of natural rights as mysticism or emotionalism[.]"[276] Indeed, the very concept of inalienable, inherent rights—and their apparent endorsement of economic liberty—forms the core of Sandefur's legal worldview, and it leads him to venerate Justice Field as "one of the great figures in the history of American liberty."[277]

Here, Sandefur has found a kindred spirit. In the same vein that Sandefur considers post-*Lochner* economic jurisprudence to be a "perversion of legal authority,"[278] Justice Field once decried New Orleans's regulatory efforts to remove rotting livestock entrails from its streets and waters as "similar in principle and as odious in character as the restrictions imposed in the [eighteenth] century upon the peasantry in some parts of France."[279]

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appointment-that-youve-probably-never-heard-of-d2b083a153ab/ [https://perma.cc/T9JR-GPUD]. *But see* George Leef, *Justice Bolick Frightens the Statists*, FORBES (Jan. 11, 2016, 3:00 PM), https://www.forbes.com/sites/georgeleef/2016/01/11/justice-bolick-frightens-the-statists/#2fe5b639498a [https://perma.cc/37EN-FUG6] (responding critically to Millhiser's article).

[272] CLINT BOLICK, DEATH GRIP: LOOSENING THE LAW'S STRANGLEHOLD OVER ECONOMIC LIBERTY 46 (2011).

[273] Timothy Sandefur, *Curriculum Vitae*, http://sandefur.typepad.com/CV.pdf [https://perma.cc/SCD4-UY4Y] (last updated Nov. 2017).

[274] *Id.*

[275] *See* Timothy Sandefur, *A Protestant Atheist*, FREESPACE (Apr. 16, 2005), http://sandefur.typepad.com/freespace/2005/04/i_think_thomas_.html [https://perma.cc/3EAP-3L7N].

[276] Timothy Sandefur, *The Conscience of the Constitution: An Introduction*, VOLOKH CONSPIRACY (Jan. 13, 2014, 10:26 AM), http://volokh.com/2014/01/13/conscience-constitution-introduction/ [https://perma.cc/Q7TS-NSPP]. One professor replied to Sandefur's article in comic fashion: "Tim, can you discuss how your views of the U.S. Constitution have been influenced by the writings of Ayn Rand?" Orin Kerr, Comment to *The Conscience of the Constitution: An Introduction*, VOLOKH CONSPIRACY (Jan. 13, 2014, 10:26 AM), http://volokh.com/2014/01/13/conscience-constitution-introduction/ [https://perma.cc/Q7TS-NSPP].

[277] *See* Timothy Sandefur, *Happy Birthday, Stephen J. Field!*, FREESPACE (Nov. 4, 2010, 2:28 PM), http://sandefur.typepad.com/freespace/2010/11/happy-birthday-stephen-j-field.html [https://perma.cc/A6KW-XB4X]; *see also* Eastman & Sandefur, *supra* note 52, at 125.

[278] Sandefur, *supra* note 253, at 1042.

[279] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 92 (1872) (Field, J., dissenting); *see also* MILLHISER, *supra* note 44, at 11. For a grisly image of *Slaughter-House*-era New Orleans, see BEATTY, *supra* note 45, at 117–20.

Viewed through this lens, it is impossible to interpret the state licensing lawsuits as anything more than pawns in an increasingly contentious game of chess. These occupational statutes, which often impose steep barriers to entry on small-time entrepreneurs and business owners, represent easy game for attorneys steeped in years of economic liberty-based literature. But just as civil rights activists contemplated broader concepts of justice when protesting the segregation of bus seats and water fountains, libertarian organizations will be happy to re-litigate *Lochner* when the opportunity finally presents itself.[280]

IV. "ON TO THE PLAIN AND IN THE DAYLIGHT": A PRAGMATIC APPROACH TO PRESERVE THE MODERN STATE

Until that time comes to fight for economic due process in its barest terms, the Rehabilitationists will continue to call attention to oppressive economic legislation and convert new adherents of activism. As *The New Republic* elaborates, there is a reason why libertarian lawyers are content to fight the first battles on these terms:

> Barnett and his contemporaries prefer to root their arguments in specific injustices rather than categorical abstractions. Why shouldn't bakers be allowed to work more than [sixty] hours a week, or individuals be allowed to remain uninsured? Why should the government be allowed to regulate out of existence my right to hail a driver or your right to rent a stranger's house for a weekend?[281]

These "categorical abstractions," of course, represent the main engines of the modern economy, and the debate centers on what the government's level of involvement in their machination should be. Libertarian ideology calls into question many of the regulatory measures that emerged from the Great Depression's rubble, and legal figures within the movement like Barnett and Epstein have dedicated much of their careers to explaining why this skepticism is constitutionally vindicated. While the traditional narrative of *Lochner* too frequently strays into hysteria, prophesizing the return of child labor and cutthroat work weeks should liberty of contract regain the high ground,[282] it is undeniable that the Rehabilitationists have a

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[280] *Cf.* Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (integrating the University of Texas's law school under *Plessy*'s "separate but equal" doctrine). The author analogizes these movements in strategy only.

[281] Beutler, *supra* note 134 (original emphasis omitted).

[282] *See id.* ("[A] president who adopted [a] . . . model, with the goal of rehabilitating *Lochner*, could erode the legal and administrative foundations of the past century in a matter of years."); Erik Loomis, *Creeping Lochnerism*, LAW., GUNS & MONEY (Sept. 1, 2015, 7:34 AM), http://www.lawyersgunsmoneyblog.com/2015/09/creeping-lochnerism [https://perma.cc/25HC-6SFP]; *see also* 151 CONG. REC. 11,841 (2005) (statement of Sen. Leahy) ("A return to the *Lochner* era would mean a return to a time without protections against child labor.").

profoundly different vision of America than many of the New Deal's benefactors.[283] Opposition to that vision should be framed not by long-expunged horrors of centuries past, but in terms of basic material conditions that the dragon's release puts at risk.

Bernstein, though claiming to be a mere spectator in this war for the heart and soul of the free market, has crafted a powerful narrative of economic liberty's roots in American common law and tragic demise at the hands of Progressive statists, to which its renaissance would be a logical and merited conclusion.[284] But this parable, now boilerplate in *Lochner* revisionism, falls flat on crucial fronts. The Rehabilitationists simultaneously overstate the liberty of contract's precedents while whitewashing its radical origins, and waste time defeating strawmen to excuse *Lochner*'s case but not its doctrine.[285] These corrections ultimately fail to demonstrate why economic due process should be revitalized in the modern age, further solidifying this author's belief that our nation's "desultory affair with economic libertarianism" should be confined to a one-time affair.[286]

A. "Count His Teeth and Claws"

Bernstein's *Rehabilitating Lochner*,[287] it must be conceded, is a compelling work of historical depth, and it rectifies the record in several areas pertaining to *Lochner* and its era. The Supreme Court during this time—i.e. the forty years that spanned the *Allgeyer* and *West Coast Hotel* decisions—did not, for instance, strike down broad swaths of economic regulation at every opportunity afforded to it; in fact, it upheld far more regulatory legislation than it overturned.[288] This alone calls the "dragon" depicture into question, and it is further evident that *Lochner*'s majority was not comprised of renegade hacks. Three of these Justices had voted to uphold the working-hours limit for coal miners in *Holden*,[289] and Justice Harlan, author of one of *Lochner*'s celebrated dissents, was himself an adherent of the liberty of contract (and, more generally, an expansive reading of the Fourteenth

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[283] The Cato Institute, for example, favors repealing the National Labor Relations Act, the Fair Labor Standards Act (including its provisions guaranteeing a minimum wage and overtime pay), the Family and Medical Leave Act, large components of the Americans with Disabilities Act, and many more labor-related safeguards that protect basic autonomy in the workplace. Walter Olson, *Labor and Employment Law, in* CATO HANDBOOK FOR POLICYMAKERS 615 (8th ed. 2017), https://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition-62_0.pdf [https://perma.cc/JDQ6-245U]. One can only wonder where the Civil Rights Act slots on the chopping block.

[284] *See supra* notes 139–155 and accompanying text.

[285] *See* AMAR, *supra* note 9, at 562 n.26 ("[M]uch of the rest of Bernstein's book fails to engage the best criticisms of *Lochner*, preferring instead to knock down an army of straw men. . . . Bernstein fails to rehabilitate *Lochner* even though he does defrock Holmes.").

[286] Purdy, *supra* note 94, at 196.

[287] *See* BERNSTEIN, *supra* note 67.

[288] *See* Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, Y.B. SUPREME CT. HIST. SOC'Y 53, 69–70 (1983).

[289] BERNSTEIN, *supra* note 67, at 31, 33.

Amendment).[290] When matters of health and safety were not at bar, Harlan would frequently vote in favor of preserving economic liberty, even authoring the *Adair* opinion that prompted an avalanche of Progressive ire.[291]

But while Bernstein shines light on some darkened corridors, he in turn obfuscates important criticisms. "[T]he significance of liberty-of-contract and antiregulatory federalism doctrines was not that they became a hard-and-fast set of rules," Jedediah Purdy observes, "but that they created, used, and, in so doing, expanded a set of available constitutional arguments."[292] While the *Lochner* era was not a great furnace, incinerating all regulations that were thrown into its flames, this new pro-market, anti-regulatory template for debate struck down more than 200 pieces of state and federal regulations between the 1880s and 1930s, many of which were significant in scope.[293]

Bernstein may sing the praises of Justice Harlan and hail the three-man exodus from *Holden* to *Lochner* as proof of the latter's orthodoxy, but the reality is that Justices Brewer and Peckham—and their predecessor, Justice Field—receive the lion's share of today's libertarian adulation.[294] Indeed, the *Lochner* duo embodied the very de-regulatory essence of the ideology, having opposed state intervention into markets of all shapes and sizes commenced under the guise of class legislation. In addition to voting against basic legislative safeguards for the coal miners in *Holden*, Justices Brewer and Peckham would have invalidated, among other things, municipal regulations of waste collection;[295] the practice of mandatory smallpox vaccination;[296] laws forbidding employers from paying their workers in credits redeemable only at company stores;[297] and, in Brewer's case, the very concept of progressive taxation.[298] This is not to say that Justices who came of age during the Civil War should have spotless records by contemporary societal standards; as Bernstein makes clear, Justice Holmes largely escapes criticism for several ignominious rulings.[299] But the liberty of

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[290] *See supra* notes 79–82 and accompanying text.

[291] BERNSTEIN, *supra* note 67, at 45, 127.

[292] Purdy, *supra* note 94, at 208.

[293] *Id.* at 197; *see also* Kens, *supra* note 77, at 428 (noting that Justice Sutherland "was not talking about counting cases" when he wrote that "the power to abridge [liberty of contract] . . . could only be justified by the existence of exceptional circumstances" during the *Lochner* era (original emphasis omitted) (quoting W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 406 (1937) (Sutherland, J., dissenting))).

[294] *See* MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910, at 186 (1994); Eastman & Sandefur, *supra* note 52, at 128; Ely, *supra* note 132, at 592; Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 971 (1975).

[295] Gardner v. Michigan, 199 U.S. 325, 326, 334–35 (1905).

[296] Jacobson v. Massachusetts, 197 U.S. 11, 12–13 (1905).

[297] Otis v. Parker, 187 U.S. 606, 606–07, 611 (1903).

[298] Knowlton v. Moore, 178 U.S. 41, 110 (1900) (Brewer, J., dissenting); Magoun v. Ill. Tr. & Sav. Bank, 170 U.S. 283, 301 (1898) (Brewer, J., dissenting).

[299] BERNSTEIN, *supra* note 67, at 45–46, 97–98. Bernstein also rightfully takes Holmes to task for his near-dissent in an early civil rights case. *Id.* at 82–85.

contract's patron saints would have weaponized the Due Process Clause in a manner untenable to many Americans.

Bernstein, however, denies that laissez-faire ideology played a dominant role in *Lochner*-era jurisprudence, echoing one of the first rallying cries of *Lochner* revisionism.[300] To demonstrate this, he briefly trots out nineteenth century legal scholar Christopher Tiedeman to serve as a foil to the *Lochner* Court's relative moderation.[301] Tiedeman was a radical libertarian in the mold of Herbert Spencer, who condemned virtually any statute regulating the hours and wages of workers as unconstitutional, as well as usury laws, bans on narcotic drugs, and protective tariffs.[302] Thus, because the Court upheld such laws by unanimous vote, it was never the bastion of free-market constitutionalism that Tiedeman so advocated.[303] Even Justices Brewer and Peckham, "[t]he most libertarian justices" of this era, "were not nearly as radical as Tiedeman."[304]

This analysis is simplistic, and the minimization of Tiedeman's influence is consistent in Rehabilitationist scholarship.[305] It is an especially curious omission on the part of Bernstein, who has posited that the liberty of contract formulated mostly at the state level.[306] Tiedeman, the laissez-faire figure "most explicit in articulating a rationale for the constitutional protection of unenumerated constitutional rights,"[307] was quoted favorably by lower courts in "hundreds of cases" in the decades leading up to *Lochner*.[308] In 1895, for instance, the Illinois Supreme Court cited Tiedeman's treatise on the limitations of the police power to invalidate a law that restricted women from working more than eight hours per day or forty-eight hours per week.[309] A few years later, the Wisconsin Supreme Court cited his work seven times in an opinion that struck down the state's ban on yellow-dog contracts.[310] Neither Justice

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[300] *Id.* at 20–21.

[301] *Id.* at 21.

[302] David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 99 (1990). Admirably, Tiedeman also staunchly opposed anti-miscegenation laws. *Id.*

[303] BERNSTEIN, *supra* note 67, at 21.

[304] *Id.* at 20–21.

[305] Mayer, *supra* note 302, at 97 ("[R]evisionist scholars have neglected one pivotal figure of laissez-faire constitutionalism: Christopher Gustavus Tiedeman.").

[306] BERNSTEIN, *supra* note 67, at 18–19; *see also* Kens, *supra* note 141 ("[Bernstein's] work shows that the theory combining due process of law and liberty of contract, as the *Lochner* majority opinion used it in 1905, did not take hold until the late 1880s, and even then primarily in state courts."). In contrast to Bernstein's inability to invoke founding principles in defense of the doctrine, there is an abundance of evidence that many of the Framers supported general redistributive policies. *See* Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1323–28 (2016).

[307] Mayer, *supra* note 302, at 97.

[308] *Id.* at 98 (citing CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT ix (The Lawbook Exhange, Ltd. 2004) (1900)). This level of influence is remarkable considering that Tiedeman never held a judicial position. *See id.*

[309] Ritchie v. People, 40 N.E. 454, 459 (Ill. 1895).

[310] State *ex rel.* Zillmer v. Kreutzberg, 90 N.W. 1098, 1099–1104 (Wis. 1902).

Brewer nor Peckham took up arms for the unlimited freedom of drug use, but their conceptions of economic liberty were nearly identical to Tiedeman's:

> Tiedeman regarded liberty of contract as a right the law should guarantee equally to the employer and the employee. Although recognizing that the legal equality between employer and employee was nothing more than "a legal fiction," he nevertheless limited the legitimate regulation of the labor contract to the preservation of the health and safety of the worker or to the protection against fraud. All other regulation—including regulation of workers' wages and hours—would violate the constitutional guarantee of liberty of contract, which Tiedeman argued was "intended to operate equally and impartially upon both employer and employee."[311]

Furthermore, Tiedeman's tribal fear of collectivism was well-represented among liberty of contract advocates at all levels of the American judiciary. At the time that Tiedeman warned "[t]he demands of the Socialists and Communists" in America would result in the abolition of "all private property in land" until the government was "the sole possessor of the working capital of the nation,"[312] state courts were engaging in similar practices of red-baiting.[313] At the Supreme Court, Justice Field waxed poetic on the impending doom of free-market capitalism.[314]

Justice Brewer spoke of his aversion to centralized government in the plainest of terms.[315] And in an amusingly bizarre episode, Chief Justice Taft made it his dying mission to prevent the judiciary from signing off on illegitimate redistribution in the wake of Black Tuesday: "I must stay on the court in order to prevent the Bolsheviki from getting control."[316] In that spirit, Taft likely would have agreed with Tiedeman's belief that collectivism placed "natural rights . . . in imminent danger of serious infringement."[317] This is not to say that the liberty of contract's inception was owed

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[311] Mayer, *supra* note 302, at 140 (footnotes omitted); *see also* Millhiser, *supra* note 141, at 514–17 (tying proto-Lochnerian decisions to Tiedeman's writings).

[312] Mayer, *supra* note 302, at 117–18 (quoting CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 80 (1890)).

[313] *See* MILLHISER, *supra* note 44, at 89.

[314] *See* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 607 (1895) (Field, J., dissenting) ("The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness."); *see also* Cachán, *supra* note 44, at 574–76 (describing Field's hostility toward what he perceived to be "socialistic" legislation).

[315] *See* Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) ("The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."); *see also* BRODHEAD, *supra* note 294, at 121 ("Brewer sympathized with [the Populist] goal of a better distribution of material things but feared that they were ignoring the 'lessons of history' and that their programs would lead to socialism."); Purdy, *supra* note 94, at 211 n.85.

[316] Hunter, *supra* note 33, at 35.

[317] TIEDEMAN, *supra* note 312, at 80.

solely to an ideological dichotomy between collectivist redistribution and libertarian intransigence, or even that it was a defining influence on the Court. As many of Bernstein's predecessors have argued, economic due process sprung largely from "[t]he Jacksonian distaste for granting special economic privilege and preference for competition," which "had a significant impact on constitutional thought" of the generation wherein the doctrine was incubated.[318] But it is reasonable to believe, as Purdy does, that "there was a mutually reinforcing relationship between the prominence of laissez-faire thinking and the shape the Court gave to substantive due process[.]"[319] Given both the influence of a radical libertarian, like Tiedeman, in the doctrine's nascent stages and the loaded rhetoric of the Justices themselves, one can safely say that "laissez-faire thinking infused strands of elite and popular thinking" of the era.[320]

Put another way, one would be hard-pressed to envision a situation in which *Lochner* revanchists fail to draw inferences from a constitutional doctrine that: (1) was espoused by a Marxist professor in its infancy, (2) supported with recurrent citations to *Das Kapital* by state-court judges, and (3) eventually adopted by left-leaning Justices that engaged in overtly redistributive rhetoric. By disclaiming laissez-faire's influence in this era as Progressive myopia, revisionist scholarship has in turn "produced a myth of its own."[321]

B. "See Just What Is His Strength"

Libertarian scholars may debate the degree to which laissez-faire politics permeated *Lochner*-era jurisprudence, but the Rehabilitationists face an uphill battle today on optics alone. One of the liberty of contract's most enduring criticisms during the Progressive era was that it failed to account for—and actively preserved—unequal bargaining power between employer and employee.[322] Chiefly, the Court's conception of substantive due process ignored "the actual facts of inequality as

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[318] Ely, *supra* note 132, at 595; *see also* Les Benedict, *supra* note 67, at 318–21, 327–31 (detailing the impact of Jacksonian ideals on the opposition to class legislation). Revisionists, though, have greatly exaggerated anti-monopolist and "Free Soil, Free Labor" ideals of Jacksonian democracy as influences specific to the field. *See* Cachán, *supra* note 44, at 550–64. These scholars have misinterpreted Field's rhetoric in his *Slaughter-House* dissent to mean that he was a Free-Soil advocate in the abolitionist sense, even though Field was plainly speaking in terms of laissez-faire. *Id.* at 568–69. Moreover, revisionists have likely erred in their broader assumptions of Gilded Age jurisprudence. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 790 (1985) (observing the transformation of "Jacksonian protest vocabulary into a defense of the few against the many"); Kens, *supra* note 77, at 416–19.

[319] Jedediah Purdy, Lochner *and Liberty: A Response to David Bernstein*, DEMOCRACY (Dec. 20, 2011, 10:15 AM), http://democracyjournal.org/arguments/lochner-and-liberty-a-response-to-david-bernstein/ [https://perma.cc/3YDJ-82NP].

[320] *Id.* Justice Holmes, casting a watchful eye, observed as early as 1897 that "[w]hen socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England . . . ." Holmes, *supra* note 2, at 467.

[321] Kens, *supra* note 77, at 430.

[322] *See supra* notes 63–94 and accompanying text.

between employer and employee in bargaining for labor in many sorts of employment," wrote Progressive scholar Roscoe Pound in an influential law review article.[323] The Justices appeared to be unfamiliar with "actual industrial conditions" that created "practical conditions of inequality[,]" obstinately treating labor contracts as if the parties "were farmers haggling over the sale of a horse[.]"[324] Purdy conveys a more sympathetic account, but he reaches the same conclusion:

> In effect, the Court decided that constitutional doctrines that blocked some economic regulations were the best way to define a new version of American citizenship that made everyone equally free for the first time. The problem was not that they were insincere or inane, but that they were wrong: Everyone wasn't equally free.[325]

Ergo, Libertarians that still insist on enforcing a liberty to *contract* may run aground when confronted with age-old questions of employee bargaining power, just as universal healthcare advocates who campaign for a constitutional "right to life" doctrine would risk exposing themselves to charges of hypocrisy on the abortion front. Some Rehabilitationists seem willing to concede this loss and have proactively sought to re-brand its arguments. Sandefur, for example, has long crusaded for the "right to earn a living" as the modern standard for economic liberty,[326] while Bernstein recently unveiled the more wonkish "right to pursue a lawful occupation."[327]

These slogans are packaged as sensible solutions to the oppressive licensing laws currently at issue—the "specific injustices" belying the "categorical abstractions."[328] But, they are mere vessels for the goal of the last thirty years of *Lochner* revisionism. This is the Trojan Horse through which economic due process enters the city, and it is why Colby and Smith predict that "conservative legal thought will soon gravitate to the view that the Constitution requires judicial protection for economic liberty."[329] Whether it is initially advanced by the modest proposal of the "rational basis with a bite" concept adopted in the Fifth, Sixth, and Ninth Circuits,[330] or eventually by the more robust approach of installing *Lochner*-esque strict scrutiny review for all

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[323] Pound, *supra* note 152, at 486.

[324] *Id.* at 454.

[325] Purdy, *supra* note 32; *see also* BEATTY, *supra* note 45, at 160 ("In the name of preserving the phantasmal economic independence of the American worker, [liberty of contract] denied him, her, and the kids the rudiments of economic security.").

[326] *See* Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J. L. & PUB. POL'Y 1009, 1072 (2015); *see generally* SANDEFUR, *supra* note 157; Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003).

[327] *See* Bernstein, *supra* note 225, at 302–03.

[328] Beutler, *supra* note 134.

[329] Colby & Smith, *supra* note 30, at 600.

[330] *See supra* note 223 and accompanying text; *supra* Section III.A.

economic regulation, "[t]he stage is now set for new originalist defenses of economic liberties."[331]

Bernstein inadvertently offers a vision of what the future may hold. "Even if one disagrees with the outcome of some of the liberty of contract era's due process cases," Bernstein argues, "the principle established in those cases—that the police power is not infinitely elastic—is a sound one[.]"[332] This jurisprudence, which allowed states to regulate behavior to preserve matters of public health, safety, or morals,[333] is "preferable to the existing mainstream Progressive alternative emphasizing almost judicial total deference to legislation."[334]

Reviving *Lochner* means reinstituting the police power as the de facto standard of review for economic regulation, and it requires courts to evaluate laws with a "'presumption of liberty' rather than . . . a presumption of deference."[335] On its face, this is a reasonable benchmark; the descriptors of health, safety, and morals seem to cover a lot of territory. In reality, they served as a constraint against achieving the sort of reforms that today are so commonplace as to feel institutional. A statute that could not be justified under one of these categories was condemned as a "labor law, pure and simple,"[336] which could not be deployed to remedy "inequalities of fortune."[337] For this reason, the Court was uniformly hostile towards laws that stipulated wage floors or guaranteed unions the right to organize workers—neither could be externally justified as preserving an inherent communal good.

With rational basis review effectively exiled, what would the police power mean in modern times? Despite *Lochner*'s infamy having centered around its rejection of a limit upon working hours, maximum working hours regulations would likely pass constitutional muster today due to the abundance of research that connects longer working schedules to health problems.[338] But minimum wage laws and bans on yellow-dog contracts lie on shakier ground. What health reasons could justify wage floors, which are enacted *specifically* to remedy an inequality of fortune? Studies evaluating the efficacy of wage floors in increasing the standard of living often reveal

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[331] Colby & Smith, *supra* note 30, at 600.

[332] BERNSTEIN, *supra* note 67, at 127.

[333] *See supra* notes 34–43 and accompanying text.

[334] BERNSTEIN, *supra* note 67, at 127.

[335] Rosen, *supra* note 133.

[336] Lochner v. New York, 198 U.S. 45, 57 (1905).

[337] Coppage v. Kansas, 236 U.S. 1, 17 (1915). Indeed, the Court explicitly endorsed the notion of economic inequality: "[I]t is . . . impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." *Id.* Perhaps no greater ode to capitalism has ever been penned by a sitting Justice.

[338] *See, e.g.*, Claire Zillman, *Science Says Working Long Hours Is Seriously Bad for Your Health*, FORTUNE (Aug. 20, 2015), http://fortune.com/2015/08/20/working-long-hours-health/ [https://perma.cc/4QM3-KP6B].

mixed results,[339] and some even suggest that they are counterintuitive.[340] Furthermore, the utility of organized labor is an inherently political debate that would be unlikely to trigger one of the police power's protections. The *Lochner* Court struck down pro-union laws under the belief that labor unions did not "directly ameliorate working conditions,"[341] an argument that today's conservatives would likely echo.[342] In both instances, it is difficult to see a neo-Lochnerist Court ignore the infringement on economic liberty—the liberty that equally guarantees both employer and employee the right to bargain for whatever price and terms they desire[343]—that occurs when a government mandates a certain wage be paid or bans businesses from attaching anti-union terms to its employment contracts.

Less heralded but equally perilous is what such a Court would do to resolve *Adams* and *Ferguson*, the cases that dealt with state authority to prohibit "injurious practices" of businesses, such as upfront fees from employment agencies or non-sanctioned debt-adjusting.[344] Restrictive laws like the one in *Ferguson* could very well be on the chopping block, as they reek of the type of paternalism that legal libertarians are eager to challenge. Why should debt-adjusting be limited to lawyers if citizens wish to contract with experts in other fields?[345] Why should employment agents not ensure themselves payment while providing a service that is "useful, commendable, and in great demand"?[346] An *Adams*-esque redux in a *Lochner*-friendly climate would be unlikely to trigger a morality exception, as the Old Court found "nothing inherently immoral or dangerous to public welfare" in charging immediate fees from people least able to pay them.[347]

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[339] *See, e.g.*, CONG. BUDGET OFF., THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME (Feb. 18, 2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/44995-MinimumWage.pdf [https://perma.cc/S5H8-E9Q7].

[340] *See* Joseph J. Sabia, *Minimum Wages: A Poor Way to Reduce Poverty*, CATO INST. TAX & BUDGET BULL., (Mar. 2014), https://object.cato.org/sites/cato.org/files/pubs/pdf/tbb_70.pdf [https://perma.cc/GTB8-XW54].

[341] BERNSTEIN, *supra* note 67, at 53.

[342] *See, e.g.*, Matt Ford, *A Narrow Escape for Public-Sector Unions*, ATLANTIC (Mar. 29, 2016), https://www.theatlantic.com/politics/archive/2016/03/friedrichs-supreme-court-decision/470103/ [https://perma.cc/H3QL-GHWV].

[343] Coppage v. Kansas, 236 U.S. 1, 14 (1915) ("The right [to liberty of contract] is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.").

[344] *See supra* notes 226–231 and accompanying text.

[345] *See generally* George C. Leef, *The Case for a Free Market in Legal Services*, CATO INST. (Oct. 9, 1998), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa322xa.pdf [https://perma.cc/Y5P8-NVXT].

[346] Adams v. Tanner, 244 U.S. 590, 593 (1917).

[347] *See id.*

C. "To Kill Him or to Tame Him"

Surveying the landscape, this author sees an untenable relationship between rising libertarian sentiments and protectionist state licensing laws. Lying in the crossfire is the very heart of American regulation: the separation of economic and social liberties. As Purdy elucidates, "[N]eo-Lochnerism supposes that the distinction between politics and markets, or principles and interests, is spurious: A democratically adopted policy is just the aggregation of some people's interests, and a company's economic interests make as worthy a basis for political argument as any principle."[348] As previously demonstrated, the leveling of this playing field would eliminate many redistributive and regulatory policies that Americans regard as necessary in reducing economic inequality.

The author of this Note proposes a compromise to save the baby (if not the bathwater). Liberal jurists should concede to the Rehabilitationists a victory on the licensing-law front, and they should embrace it as a fortification of rational basis review rather than a capitulation. Without resorting to libertarian rhetoric in the vein of cronyism and rent-seeking, liberals can agree that economic protectionism is not a legitimate public interest for legislatures to promote.

As liberal legal scholar Cass Sunstein has long contended, protectionist laws violate the common law principle of prohibiting legislators from enacting their "naked preferences" into law.[349] Jeffrey Rosen has further argued that governments may only "regulate economic liberties in the public interest," as "regulations that benefit private interests are *ultra vires* and unconstitutional."[350] "The most naked wealth transfers from one group to another" could be invalidated, Rosen suggests, "but everything else would be upheld as legislation in the public interest."[351]

This author does not reach Rosen's level of speculation with regard to class legislation, nor does he flirt with Rosen's concept of "rational basis with a bite;"[352] rational basis simply needs to be applied rationally. If *Lochner*-conscious liberals are reluctant to expand its scope under Due Process challenges, these judges can strike down protectionist statutes on Equal Protection grounds for unreasonably favoring certain businesses. While liberals "tend to have faith in the capacity of government regulation," Bernstein chides that egalitarians should be more "concerned with dismantling laws that institutionalize and enforce unearned privilege."[353] After all,

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[348] Purdy, *supra* note 94, at 202.

[349] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984).

[350] Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL'Y 181, 181 (1997).

[351] *Id.* at 193. Of course, Rosen is not proposing that redistribution *per se* is unconstitutional, as most wealth transfers serve a legitimate interest: "As long as there is a plausible argument that minimum wage laws, for example, serve the public interest, rather than representing naked wealth transfers, courts should uphold them." *Id.* at 190.

[352] *See id.* at 192–93.

[353] Bernstein, *supra* note 225, at 297–98. To be sure, libertarians do not have a monopoly on licensing law criticism. Dean Baker has frequently assailed occupational licensing legislation (and rent-seeking writ

licensing laws disproportionately favor native-born whites as opposed to immigrants and people of color.[354]

The Rehabilitationists score a point here, but their ultimate triumph—the unconditional surrender of New Deal jurisprudence by way of the dragon's return—would constitute a massive overreach. Markets are not "natural phenomena, arising from their own organic principles and free human action,"[355] and a doctrine that constitutionalizes this theory should be actively avoided. Instances of Progressive-era profligacy do not warrant the resurgence of an anachronistic worldview, regardless of whatever name it goes under.

Furthermore, this author's proposal is a mild one in the greater scheme of constitutional warfare, and it is downright milquetoast when compared to more ambitious leftist projects. Joseph Fishkin and William E. Forbath, for example, have begun to advance their vision of an "Anti-Oligarchy Constitution,"[356] which centers on "the nation's distribution of opportunity, wealth[,] and power."[357] "Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity," Fishkin and Forbath write, the reality of which is "incompatible with, and a threat to, the American constitutional scheme."[358] They cite the Jacksonian era,[359] the Populist and Progressive movements,[360] and the New Deal[361] as key points in history that embodied a legitimate ideal of redistributive justice, and

large) from the left for unduly protecting professional-class workers, inflating their pay, and ultimately exacerbating inequality. *See, e.g.*, Dean Baker, *The Compensation of Highly Paid Professionals: How Much Is Rent?* 3 (Ctr. for Econ. & Policy Research, Working Paper, 2016), http://cepr.net/images/stories/reports/highly-paid-professionals-2016-08.pdf [https://perma.cc/5FPE-V934]; *see also* Dean Baker, *The Upward Redistribution of Income: Are Rents the Story?* 1 (Ctr. for Econ. & Policy Research, Working Paper, 2015), http://cepr.net/documents/working-paper-upward-distribution-income-rents.pdf [https://perma.cc/6SZ8-GCVB].

[354] *See* Stuart Dorsey, *Occupational Licensing and Minorities*, 7 LAW & HUM. BEHAV. 171, 172–75 (1983). *But see* Peter Q. Blair & Bobby W. Chung, *Occupational Licensing Reduces Racial and Gender Wage Gaps: Evidence from the Survey of Income and Program Participation* 1 (Human Capital & Econ. Opportunity Glob. Working Grp., Paper No. 2017-050, 2017), https://econresearch.uchicago.edu/sites/econresearch.uchicago.edu/files/Blair_Chung_2017_licensing_gender_racial_wage_gaps.pdf [https://perma.cc/7PUA-7R3Z] (finding that occupational licensing laws benefit licensed minority and female job applicants by "enabl[ing] firms to rely less on race and gender as predictors of worker productivity").

[355] Purdy, *supra* note 32; *see also* Nicole M. Aschoff, *The Free-Market Fantasy*, JACOBIN (Apr. 15, 2015), https://www.jacobinmag.com/2015/04/free-market-conscious-capitalism-government/ [https://perma.cc/PD7Q-YVLR] ("Designating the market as natural and the state as unnatural is a convenient fiction for those wedded to the status quo. It makes the current distribution of power, wealth, and resources seem natural and thus inevitable and uncontestable.").

[356] Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014).

[357] *Id.* at 674.

[358] *Id.* at 693.

[359] *Id.* at 673–77.

[360] *Id.* at 677–87.

[361] *Id.* at 687–90.

remark that many of our current struggles reflect the regulatory battles of the *Lochner* era.[362]

This manifesto—a full-frontal assault on the constitutionality of economic inequality, juxtaposed with the hands-off approach required by rational basis review—could conceivably serve as the Left's answer to the Rehabilitationist movement. Increased awareness of wealth inequality "intensifies concerns about oligarchy, the state of the middle class, and the prospects of inclusion,"[363] and it is one of the catalysts for what Fishkin and Forbath hope will reverse the "Great Forgetting" of anti-oligarchy principles that taints modern discourse.[364] The problem, they insist, is that the Left tends to not think of these quandaries as constitutional issues, which cedes ground to the Right to re-state the case for laissez-faire constitutionalism.[365] But if "liberals and progressives . . . could respond" to these anti-regulatory arguments "with a rekindled account of the broader commitments embodied in the distributive Constitution,"[366] then conservatives would no longer be able to monopolize a sense of guardianship to the document and its text. Only then can the Left return to "[a]ddressing the problem of oligarchy in a modern capitalist society."[367]

In the meantime, courts need not contemplate these far-reaching questions. These debates are complicated and consequential, but the immediate solution is simple. Judges should decide what they know to be true—that economic protectionism is not rationally related to a legitimate public interest, and thus runs afoul of non-favorited citizens' Equal Protection rights—without accepting the merits of the Rehabilitationists' extremist enterprise.

CONCLUSION: "AN ENLIGHTENED SKEPTICISM"

The liberty of contract came to power at a time when "the rise of industrial capitalism and a vast population of wage laborers made [it] . . . pervasively relevant at the turn of the last century."[368] This concept of economic due process, which was intended to "constitutionally protect certain transactions that lie at the core of the economy,"[369] radically altered the terrain of constitutional law by setting strict parameters under the Fourteenth Amendment concerning what governments could or could not enact as ameliorative legislation. But "[m]ore important than the

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[362] *Id.* at 690 ("Today, as class inequalities have returned to Gilded Age levels, our political system is beginning to refight a striking number of the great political-economic battles of the late nineteenth and early twentieth centuries . . . .").

[363] Jedediah Purdy, *Overcoming the Great Forgetting: A Comment on Fishkin and Forbath*, 94 TEX. L. REV. 1415, 1417 (2016) (previewing Fishkin and Forbath's forthcoming scholarship in this realm).

[364] *Id.* at 1415.

[365] *See id.* at 1416. *See generally* William E. Forbath, *Workers' Rights and the Distributive Constitution*, DISSENT, Spring 2012, at 58.

[366] Forbath, *supra* note 365, at 64.

[367] Fishkin & Forbath, *supra* note 356, at 692.

[368] Purdy, *supra* note 94, at 202.

[369] *Id.*

holding in *Lochner*"—or any individual case of the era—was the fear that recognizing class conflict "would open a Pandora's box of insidious state intervention in the economy."[370] All but the most fervent supporters of free and unimpeded markets should admit that the Justices, who "were well aware of increasingly volatile relationships between labor and management, as well as spiraling economic inequality," failed to foresee the consequences of unleashing unfettered capitalism upon a shackled workforce.[371]

Today, opinion is mixed as to the merit of Justice Holmes's dissent in *Lochner*, generally splitting along ideological lines. While revisionist scholarship continues to question the narrative that placed *Lochner* alongside *Dred Scott* and *Plessy* in the "Malebolge of rejected rulings,"[372] Holmes's opinion serves as a lens through which modern scholars and students can view the hallmark of Progressive-era debates. The writing is clear, concise, and brilliant, but ultimately inaccurate in several of its assumptions. It is true that "[t]he original *Lochner* era did not consist merely of corporate toadying or crudely ideological applications of laissez-faire theory,"[373] and Holmes's scathing insistence otherwise has served as the fuel which powers the Rehabilitationist machine.

Holmes, however, was correct in his most important assessment—that the Constitution does not protect the form of economic liberty that Justices Field, Peckham, and others believed to be inherently bestowed from nature. In this pivotal moment, Holmes counted the "teeth and claws" of economic liberty, and saw just what was its strength. And though he could not vanquish it in his own time, Holmes's words provided the means by which future skeptics could kill the doctrine that had prevented a more fairer and just society from emerging in the world's fastest-expanding economy.

In the original analogy broached at the outset of this Note, Holmes was speaking broadly in terms of a historical approach to the law.[374] The "dragon"—whether a rule, doctrine, or an individual case—must constantly be evaluated within the context of contemporary relevance and wisdom to determine its worth going forward. A dragon that lives outside this realm of functionality thus should be killed, lest it run roughshod on the hillsides of American jurisprudence.

Seen in this light, Justice Holmes made a valuable decision not to join his brothers in taming *Lochner*. For those who enjoy the benefits of economic redistribution and basic industrial regulations made possible only from the dragon's demise, *Lochner* was not a "useful animal" to their forebears, and it never will be for their children. The Rehabilitationists' opponents should be ready to say so once again.

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[370] Hunter, *supra* note 33.
[371] *Id.*
[372] Beutler, *supra* note 134; *see also* Greene, *supra* note 23, at 417–22.
[373] Purdy, *supra* note 32.
[374] *Id.*